JAN 3 2001

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *ex rel.*
PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an as-applied regulatory takings claim is ripe even when the land owner has: (1) never applied to undertake any activity on the buildable less-regulated, more-valuable portion of the property; (2) never applied to obtain any approval from the agency having initial jurisdiction over the development plan that serves as the basis of his claim of value; (3) nor applied to obtain any approval from the defendant agency for such development.

2. Whether a takings claimant has established deprivation of all economically viable use of his parcel when the claimant can build at least one residence on the property, thereby giving the property itself a fair market value of at least $200,000 (1986 dollars), far in excess of his monetary investment, and when, furthermore, the denied use was not itself economically viable.

3. Whether a land owner possesses the inherent right to fill coastal marshland, regardless of the severity of the adverse environmental and health effects on neighboring property owners and on his own successors, even when a comprehensive state regulatory program substantially restricting such filling in that very kind of coastal marshland predated the land owner's acquisition of the property.

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STATEMENT OF THE CASE [1]

This is a regulatory takings claim brought by Anthony Palazzolo ("Palazzolo") based upon the Rhode Island Coastal Resources Management Council's ("the Coastal Council's") denial of his application to fill all or most of eighteen acres of coastal inter-tidal marshland on a larger piece of property that also includes buildable upland. The State and its Coastal Council defend on ripeness grounds that, *inter alia*, he compromised the record by completely evading the jurisdiction of state public health agencies, he failed to file an application for the whole parcel, and he never filed a true and meaningful application. Palazzolo's challenge also fails substantively since he retains substantial beneficial use and economic value in his property, and the forbidden uses are barred by background principles of state law and would not have been economically viable in any event.

I. THE LAND

The nature of the Palazzolo parcel must be understood for a proper decision. The Atlantic Ocean, beating against the New England shore beyond the shelter of Long Island, has raised up beaches of sand

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[1] The undersigned provide this key to record citations: Tr.=trial transcript; PA=Appendix to the Petition for Writ of Certiorari; JA=Joint Appendix; JL1=Joint Lodging Number 1; JL2=Joint Lodging Number 2; RA=Respondents' Appendix (attached herein); Ex.=Exhibit. Plaintiff's exhibits are numbered while the defendants' exhibits are lettered. Unless otherwise indicated by the context, all citations to the Rhode Island General Laws are to the version of the General Laws in effect in 1983, when Palazzolo first applied to the Coastal Council for permission to fill a portion of Winnapaug Pond.

and a spine of buildable upland running along the shoreline. Behind the barrier of beach and upland are salt marshes and coastal ponds,[2] such as Winnapaug Pond.[3] The nature of the soil, a mucky peat, and tidal inundation render salt marshes unbuildable without massive alteration.[4] Behind the marshes and coastal ponds, the ground rises again to solid upland.

Development in the vicinity of Palazzolo's parcel reflects these natural conditions. The upland ridge between the Misquamicut beachfront and the marshes is readily buildable. Atlantic Avenue runs along this ridge, and private lots with summer cottages radiate from both sides of the roadway. *See* Ex. FF to JJ, S, Tr. 394-95, 659-60. *See also* Test. of Council Director Fugate, RA 36 (development "confined pretty well exclusively to the upland portion or the dry land portion that

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[2] The contrast between the beach area and the marsh is particularly apparent on the 1939 and 1963 aerial photographs. JL1, tabs 1 & 2. *See also Annicelli v. Town of South Kingstown*, 463 A.2d 133, 137 (R.I. 1983) (describing the significance of Rhode Island's barrier beaches); Mark D. Bertness, *The Ecology of Atlantic Shorelines* (1999).

[3] Winnapaug Pond is comprised of 446 acres of open water plus 146 acres of salt marsh, including the eighteen acres that occupy most of the Palazzolo parcel. *See* Test. of Biologist Reis, Tr. 495; Engineer's 1985 Field Report at 3, RA 68; Biologist's 1985 Field Report at 2, RA 55.

[4] *See* Engineer's 1985 Report, JA 23 ("The highly compressible nature of mucky peat (among other poor engineering characteristics) makes the soil complex undesirable for a . . . base . . ."); *see also* Test. of Appraiser Andolfo, JA 104 ("[T]he development costs are extraordinary . . . [N]ot . . . financially feasible . . . ."); *see also* color photographs, JL1, tab 8 (depicting inundation of the site with Atlantic Avenue cottages in the background).

immediately abuts [the road].").[5] Aside from some very minor encroachments,[6] the Winnapaug marshlands on all the pond-side properties remain in their natural unfilled condition.[7]

The Palazzolo site begins on the spine of upland and descends northward from Atlantic Avenue into the salt marshes. The disparity between upland and marsh is evident: Palazzolo's upland acreage[8] is high and dry; by contrast, his marshland is subject to twice-daily tidal flooding and includes substantial portions below mean

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[5] *See also* aerial photographs at JL2, items 2-7 (showing that the vacation homes are virtually all built on the uplands along Atlantic Avenue).

[6] *See* Test. of Council Director Fugate, RA 36 ("[t]he development that has occurred in that area, except for two remnant structures or several remnant structures... has been all along the dry land area immediately abutting Atlantic Avenue.").

[7] Palazzolo's Statement of the Case suggests that Palazzolo's fill plans were consistent with neighborhood patterns: "Like the neighboring homes, the only way to develop Palazzolo's site is to raise the grade with fill." Pet. Br. 3. In fact, at most, only three out of the scores of homes in the vicinity were possibly built on fill in the marshlands and even these examples were uncertain. *See* Tr. 201, 204-05, 249-54. *See also* aerial photographs at JL2, items 2-7 (showing that the vacation homes are virtually all built on the uplands along Atlantic Avenue). As Palazzolo himself acknowledges, RA 79, there is no instance of fill for intensive subdivision ever being permitted in Winnapaug Pond's coastal marshlands.

[8] Palazzolo's submissions to this Court ignore the fact that two pieces of upland area were identified at trial. The existence of the second area of upland within Palazzolo's territory is discussed further at Statement of the Case V.C, *infra*.

high tide.[9] *See* PA A-3; n. 39, *infra*. Ponding in small pools occurs throughout these marshes. PA A-3.

Winnapaug Pond with its marshland serves as a common amenity to all the surrounding upland properties, providing scenic and recreational qualities that underpin premium real estate values for the buildable upland. Test. of Appraiser Coyle, Tr. 382, 389-93; JL1, tab 1 (aerial photograph); CRMP § 330; R.I. Gen. Laws § 46-23-1 (1980 Reenactment). The Pond's salt marshes absorb wastes that would otherwise overwhelm the pond; provide food and shelter[10] for an abundance of recreational and commercial fish and shellfish, which add to the attraction of pond-side living; and, by biologic and chemical processes too complicated to detail here, nourish and balance the pond.[11] More directly, the marshes protect the upland portions of the abutting properties from storm damage and absorb and contain tidal inundation. *See* 1985 Engineer's Report at 4, 6, 7, RA 68.

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[9] We discuss *infra* at nn. 59, 60 the title issues presented by Palazzolo's ownership of the marshland acreage.

[10] Sheltered from the rough Atlantic seashore, the marshes are a natural nursery for sea fauna. Test. of Biologist Reis, JA 80-81, 84. *See also* William J. Mitsch & James G. Gosselink, *Wetlands* 539 (1986) ("Wetlands are among the most productive ecosystems that are found anywhere on the planet. In terms of gross and net primary productivity, salt marshes rank high . . .").

[11] Test. of Biologist Reis, JA 82 ("[t]he salt marshes provide primary production. They provide nutrients and lock up organic carbon into plant matter which then provides the basis for the food chain . . . up to the smaller fish, and then of course the larger fish. They are very important habitat . . . for those species, which are at the top of the food chain which provide commercial and recreational importance.").

II. THE POTENTIAL HARM

Salt ponds are fragile mechanisms, with limited ability to absorb wastes.[12] Large areas of the salt ponds are poorly flushed, which makes them valuable as fish and shellfish nurseries, but also particularly susceptible to the twin threats of bacterial contamination and eutrophication.[13]

Bacterial contamination, such as from failing septic systems, has obvious impacts on public health. Eutrophication can kill a pond.[14] Both bacterial

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[12] *See* Virginia Lee & Stephen Olsen, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons*, 8 Estuaries 191 (1985); *Eutrophic Shallow Estuaries and Lagoons* (Arthur J. McComb ed., 1995).

[13] *See* Boyce Thorne-Miller et al., *Variations in the Distribution and Biomass of Submerged Macrophytes in Five Coastal Lagoons in Rhode Island, USA*, 26 Botanica Marina 231 (1985); *nn. 11 & 12, supra.*; Br. Amici Curiae Dr. John Teal et al. *See also* Frank Postma et al., *Nutrient and Microbial Movement from Seasonally-used Septic Systems*, 55 J. Envtl. Health 5 (1992).

[14] Eutrophication, largely caused by septic systems, occurs when nitrogen causes oxygen levels to fall below the minimum required by fish and shellfish to survive. Eventually, waters become weed-choked and murky, the bottom becomes coated with black organic sediments, and anoxic conditions occur that can lead to the generation of toxic levels of malodiferous hydrogen sulfide. Test. of Biologist Reis, JA 83 ("Eutrophication is a condition where nutrients cause excess growth within the pond . . . causing anoxia, which is a lack of oxygen. [T]he shellfish at the bottom of the pond, and many of the fish in the water column, would be killed."). *See also* Scott W. Nixon, *Nutrients and Coastal Waters: Too Much of a Good Thing?*, 36 Oceanus 38 (1993); Nat'l Ass'n of Science, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* (2000).

contamination and eutrophication are hazardous to the high-quality economically productive and attractive resources of Winnapaug Pond.[15] Palazzolo's proposals put the Pond at serious risk.[16]

It was to safeguard against such harms, as well as health hazards, flooding[17] and direct habitat destruction, that Rhode Island developed its environmental programs.

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[15] *See* Glenn D. Anderson & Steven F. Edwards, *Protecting Rhode Island's Coastal Salt Ponds: An Economic Assessment of Downzoning to Protect These Coastal Amenities*, 14 Coastal Zone Mgmt. J. 67 (1986).

[16] Individual sewage disposal systems, ISDS, are the largest contributor of "nitrogen" in the salt ponds. Test. of Biologist Reis, JA 86-87, 89 ("Q. Above and beyond the filling itself, did you consider what impact 74 ISDS or septic systems would have? A. I did perform some nutrient loading calculations. . . . [T]hat high level of loading would cause the eutrophication in the pond and the symptoms that go along with that."). The Superior Court found the proposal a public nuisance in part because of nitrate contamination. PA B-11.

[17] Another problem with development of the Palazzolo marshland is that it is a "high hazard area for construction" on a federally designated flood-plain. Test. of Council Director Fugate, Tr. 179; *see also* Test. of Engineer Caito, Tr. 311-12. Filling such an area displaces excess water and forces flooding elsewhere, Test. of Engineer Caito, Tr. 312-13, and the fill is inherently less stable than natural upland in flood conditions. Test. of Council Director Fugate, Tr. 180 ("subject to movement"); Test. of Engineer Clarke, Tr. 567-68 ("we'd have leach fields all over the place."). There are strict federal flood control regulations regarding the filling of land in such zones (whether wetland or otherwise). Test. of Engineer Caito, Tr. 312; Test. of Engineer Clarke, Tr. 566-68; *see also* FEMA Flood Control Manual, Ex. DDD, Tr. 645-46. Palazzolo has obtained *none* of these approvals.

III. RHODE ISLAND'S REGULATORY PROGRAMS

From colonial times, by common law and constitution, Rhode Island has protected public rights to tidal wetlands and private property interests long dependant upon these wetlands. Protections included the law of nuisance, *see, e.g., Payne & Butler v. Providence Gas Co.*, 77 A. 145, 152-531 (R.I. 1910) (destruction of shell-fish bed by pollution constitutes nuisance), the public trust doctrine, *see, e.g., Dawson v. Broome*, 53 A. 151, 154-58 (R.I. 1902), and "the right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941). More recently, comprehensive regulatory programs codify and derive from these longstanding public protections.

A. Sewage Regulation

1. At the time of Palazzolo's applications. Since 1977, the Rhode Island Department of Environmental Management ("DEM") has reviewed applications for individual sewage disposal systems ("ISDS") (generally, septic tanks) to protect public natural resources and public health.[18] At the time Palazzolo applied to fill the pond, as well as today, an ISDS system could be installed only upon DEM issuance of an ISDS permit, and then only upon DEM inspection.[19]

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[18] *See* 1977 R.I. Pub. Laws ch. 182, §§ 2, 3, 16 (originally codified in relevant part as R.I. Gen. Laws § 42-17.1-2(*l*) (1977 Reenactment & Supp. 1978) and R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(m) (1970 Reenactment & Supp. 1978)).

[19] *See* R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(*l*) (1980 Reenactment & Supp. 1983); Deposition Test. of ISDS Chief Chateauneuf, at 10-12, 23-24, 32-33, Ex. W, Tr. 429-30; *see also Rules & Regulations Establishing Minimum Standards Relating to Location, Design, Constr. & Maint. of Individual Sewage Disposal Sys.* § SD 2.16 (1980), Ex. W-3, Tr. 429-30, 620. The relevant provisions of § 46-12-3 were slightly amended and redesignated as §§ 46-12-3(j), -3(k), and -3(*l*) in 1983. *See* 1983 R.I. Pub. Laws ch. 149, § 1. These

Obviously, an ISDS is necessary for a habitable dwelling in any area not served by a municipal sewer system.

2. Historical background. Prior to the transfer of regulatory power to the DEM, *see* 1977 R.I. Pub. Laws ch. 182, §§ 2, 16, the Rhode Island Department of Health ("RIDOH") had similar authority over septic systems. 1966 R.I. Pub. Laws ch. 261, § 4 (enacting R.I. Gen. Laws §§ 46-12-3(j) to 46-12-3(k)); *see Annicelli v. Town of South Kingstown*, 463 A.2d 133, 136 (R.I. 1983) (property owner obtaining ISDS permit from RIDOH prior to applying for municipal building permit).

This enactment was, in turn, preceded by a series of regulatory regimes, dating back to the early years of the last century, regulating sewage disposal.[20] *See, e.g., Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). Due to public health concerns, sewage disposal requirements have not been found to constitute takings by the State or by municipal regulation. *See, e.g., Milardo v. Coastal Res.*

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provisions remained unchanged through 1985, when Palazzolo renewed his Coastal Council application. *See* R.I. Gen. Laws § 46-12-3 (1980 Reenactment & Supp. 1985).

[20] *See* 1920 R.I. Pub. Laws ch. 1914, § 2 (creating Board of Purification of Waters ("BPW")); 1921 R.I. Pub. Laws ch. 2090 (expanding BPW and its powers); 1935 R.I. Pub. Laws ch. 2250, §§ 110, 115 (transferring functions of BPW to Division of Purification of Waters within RIDOH); R.I. Gen. Laws § 46-12-2 & compiler's note (1956) (substituting term "Division of Sanitary Engineering" for "Division of Purification of Waters" "in accordance with present usage"); 1963 R.I. Pub. Laws ch. 89, § 2 (creating Division of Water Pollution Control within RIDOH).

Mgmt. Council, 434 A.2d 266, 269 (R.I. 1981) (state denial of ISDS permit not a taking); *Sundin v. Zoning Bd. of Review*, 200 A.2d 459, 461 (R.I. 1964) (delay of development due to lack of adequate sewage disposal not a confiscation).

B. Coastal Regulation

1. At the time of Palazzolo's applications. The Coastal Council was created in 1971, 1971 R.I. Pub. Laws ch. 279 (enacting R.I. Gen. Laws §§ 46-23-1 to 46-23-12), as "the principal mechanism for management of the state's coastal resources." R.I. Gen. Laws § 46-23-1 (1970 Reenactment & Supp. 1971). From the start, Rhode Island singled out the coastal zone for comprehensive and coordinated long-range planning and management, R.I. Gen. Laws §§ 46-23-1, 42-23-6(A) (1970 Reenactment & Supp. 1971); *see Santini v. Lyons* 448 A.2d 124, 127 (R.I. 1982), and established the Coastal Council as the final arbiter of development in or adjacent to the coastal zone, *after* other agencies provided any necessary preliminary permits.[21]

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[21] The "Coastal Council goes last" policy is quite strong, finding expression in the Coastal Council's procedural rules, *see* Management Procedures § 4.2(4), RA 22-23, and in the Coastal Council's substantive regulations as well. *See* CRMP § 300.1(2); *see also id.* § 300.3(B), RA 19-20. Simply put, one cannot even approach the Coastal Council for a non-sewered subdivision unless one has in hand ISDS approvals from DEM. *See* CRMP § 300.6, "Sewage Treatment and Disposal." RA 20. In addition to the Coastal Council assent and ISDS approval, Palazzolo would need an approval letter from the municipality confirming that the subdivision met municipal zoning and subdivision code requirements. Management Procedures § 4.2(4), RA 22-23. He would also need water quality certification approval from DEM pursuant to the requirements of sections 401 and 404 of the Federal Water Pollution Control Act Amendments of 1972 (as amended),

The Coastal Resources Management Program ("CRMP" or "the Plan") provides that all alterations and projects proposed for tidal waters or areas contiguous to shoreline features shall require a Coastal Council assent (*i.e.*, permit). CRMP § 100.1. Under the Plan, filling in the coastal wetlands themselves is generally prohibited absent a "special exception." *See* CRMP §§ 100, 110 & Table 1, 130. Residential construction is not the basis of such a "special exception." *See* CRMP § 130; JA 72-73. Upland areas within 200 feet of coastal wetlands, however, are not similarly subject to a prohibition on filling and residential construction. CRMP §§ 100.1(A), Table 1A, 110.1. A landowner may apply for a "variance", which is more freely available. *See* CRMP § 120.

2. Historical background. The General Assembly enacted earlier protections for the "coastal wetlands" of the State in 1965. *See* 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-13 (repealed effective

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33 U.S.C. §§ 1341, 1344 (1982). *See* R.I. Gen. Laws §§ 46-12-1(n), 46-12-2(b), 46-12-5 (1980 Reenactment & Supp. 1983) (authorizing DEM to implement federal clean water laws); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704-08 (1994) (discussing application of § 401); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (discussing application of § 404, 33 U.S.C. § 1344). In addition, Palazzolo would need to obtain approval from the Army Corps of Engineers and other federal agencies under both section 404, 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1982). *See PUD No. 1*, 511 U.S. at 722-23 (concerning § 10 permits); *see also* Test. of Council Director Fugate, JA 66-67. Thus, even had the Coastal Council assented, Palazzolo was still a long way from putting dirt into these marshlands.

1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). The Department of Agriculture & Conservation[22] was the permitting body for activities in such areas. A coastal wetland was defined as "any salt marsh bordering on the tidal waters of [Rhode Island], whether or not the tide water reach the littoral areas through natural or artificial water courses, and such uplands contiguous thereto, but extending no more than fifty (50) yards inland therefrom." 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-14, (repealed effective 1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). Uses were restricted to activity that would not be detrimental to the salt marsh. *Id.* § 1 (enacting R.I. Gen. Laws § 2-1-13). The legislature also enacted the "Intertidal Salt Marshes Act," subjecting to criminal penalties any person who "dumps or deposits mud, dirt, or rubbish upon, or who excavates and disturbs the ecology of, intertidal salt marshes or any part of one, without first obtaining a permit." 1965 R.I. Pub. Laws ch. 26, § 1 (paragraph enacting R.I. Gen. Laws § 11-46.1-1).

Even in 1965, coastal regulation was not new to Rhode Island. Enactments dating back to 1876 (and supplanted by the Coastal Council enabling act only in 1971) controlled and managed "the public tide-waters." 1876 R.I. Acts & Resolves ch. 556, §§ 3-4, 7. *See also, e.g.*, R.I. Gen. Laws ch. 118, §§ 3-6, 10-12, 14 (1896); 1918 R.I. Pub. Laws ch. 1669, § 2; 1935 R.I. Pub. Laws ch. 2250, §§ 60, 64; 1939 R.I. Pub. Laws ch. 660, §§ 100, 101.

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[22] These functions were transferred to the Department of Natural Resources in 1965, *see* 1965 R.I. Pub. Laws ch. 137, § 1, and the Department of Natural Resources was renamed the Department of Environmental Management in 1977. 1977 R.I. Pub. Laws ch. 182, § 2.

Although the administering authority varied in these successive statutes, each granted to the respective agency the authority to permit encroachments into the public tide-waters, and prohibited all filling not so permitted.[23] For example, more than a century ago, the Board of Harbor Commissioners was given the "general care and supervision of all the . . . tide-waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein," R.I. Gen. Laws ch. 118, § 10 (1896), including "the depositing of mud, dirt, and other substances" into the public tide-waters, *id.* §11, and any such unauthorized encroachment upon the public tide waters was "deemed to be a public nuisance." *Id.* § 14. "Tide-waters" included "flats," *id.* § 7, as well as open water areas. *Cf.* R.I. Gen. Laws ch. 112, §§ 1, 8-11, 13 (1938), RA 1-3.

Nor did this type of control originate with the advent of the Board of Harbor Commissioners in 1876. Authority over lands lying below the mean high tide line had been actively exercised by the State (or colony) from its earliest settlement.[24] The ultimate foundation of the State's authority over tide-waters is the long

[23] *Dawson v. Broome*, 53 A. 151, 152 (R.I. 1902), chronicles an applicant's request for permission to fill tidal wetlands.

[24] *See generally* Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk U.L. Rev. 313, 313 (1990) ("From the earliest days of the Colony of Rhode Island and Providence Plantations, the shore has maintained this unique legal status, with colonial and now state officials charged with balancing the rights of the public and private property owners."); Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 162 (photo. reprint 1983) (1826).

established principle of Rhode Island law that the State holds a fee interest in such lands. *See Dawson*, 53 A. at 156, 157.

IV. OWNERSHIP AND DEVELOPMENT OF THE PARCEL

Palazzolo became owner of the site in 1978. The parcel was owned before then by Shore Gardens, Inc. ("SGI"), which acquired the property in 1959.[25] Almost immediately, SGI recorded with the Town of Westerly a subdivision plat representing eighty individual lots, some of these platted "under the waters of Winnapaug Pond." PA A-3. SGI sold off eleven lots, in six transactions, yielding at least three or four fully built residences.[26] "These [developed] lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land." PA A-2. In 1969, SGI reacquired five of the eleven lots previously deeded out. *Id.* Palazzolo succeeded in ownership to all of SGI's remaining properties in 1978.

V. APPLICATIONS WITH RESPECT TO THE PARCEL

A. The "Harbors & Rivers" Applications

In 1962, 1963, and 1966, SGI made three separate applications to the State Division of Harbors and Rivers for its assent to filling what is now the Palazzolo site.

[25] Palazzolo now concedes that he did not become the "owner" of the property under state law until SGI's corporate charter was revoked in 1978. *See* Pet. Br. 5, 23, 24, 43, 48.

[26] The trial court stated that Palazzolo "sold six parcels to various parties who constructed homes on them." PA B-2. Palazzolo admits to "three or four at least." JA 79.

Tr. 60-61, 124, 182-83. The 1962 and 1963 SGI applications contemplated a general filling of the entire wetlands section of the parcel. *See* Application of March 29, 1962, Ex. M, Tr. 191-93, 196; Application of May 16, 1963, Ex. 14, Tr. 142-43. The earlier SGI application proposed off-shore dredging in the open waters of Winnapaug Pond for the fill material, *see* Ex. M, Tr. 191-93, 196, while the second proposed dredging much closer to shore, if not completely within the marshlands themselves. *See* 1963 Application Ex. 14, Tr. 142-43. The 1966 SGI application contemplated filling in the area closest to Winnapaug Pond for the purported purpose of establishing a beach.[27] Application of April 29, 1966, Ex. 14, Tr. 142-43. The state Department of Natural Resources originally assented to, then, based on their adverse impacts, denied these applications on November 17, 1971. *See* Ex. 14, Tr. 142-43. The Army Corps of Engineers followed suit with respect to SGI's parallel application for a federal permit on November 23, 1971, based largely on adverse environmental impacts. *See* RA 47.

B. The Coastal Council Applications

Palazzolo made two applications to fill the property. These are the subject of this dispute. The 1983 application sought permission to construct a bulkhead on the shore of the pond and to fill the entire eighteen-acre wetlands portion of the parcel. *See* JL1, tab 5; *see also* Tr. 144; Tr. of Hr'g Regarding Coastal Council Applic. File No. 83-3-55 (Aug. 18, 1983), at 23, Ex. DD, Tr. 443-44. The application did not seek to alter the

[27] During this time period, the matter took a brief detour to the Rhode Island Superior Court. *See Palazzolo v. Lees*, RA 6-8.

upland areas,[28] and did not state any purpose for the filling.[29]

The 1983 application, "nearly identical to the application submitted in 1963," PA A-5, was rejected by the Coastal Council. JA 18. A 1985 application to fill the marsh for a beach club, "nearly identical to the 1966 application," PA A-5, was denied by the Coastal Council. *See* JA 24. Palazzolo appealed this denial pursuant to the state administrative procedures act, R.I. Gen. Laws §§ 42-35-1 to 42-35-18 (1984 Reenactment & Supp. 1986), and that appeal was denied by the Superior Court. JA 31-42.

[28] At the administrative hearing Palazzolo testified:

> Q. No doubt you propose to sell those lots?
> A. No, . . . you saic that.
> Q. And you don't propose to sell lots off this subdivision?
> A. Not necessarily.
> Q. Do you propose to build on this property?
> A. Not necessarily.
> Q. What is the purpose of filling it, then?
> A. Because it's my right to do if I want to to [sic] look at it it [sic] is my business.
> . . .
> Q. Do you know whether it would pass a perk test [a percolation test necessary for septic tanks]?
> A. It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that.

JA 11, RA 24. Thus, "the Council just had a vague notion that Palazzolo wanted to fill the area." JA 63.

[29] The application said "proposal to restore property line, protect and prevent further erosion, to fill property to elvation [sic] 6.5 Ft., to prepare property for use as designated by zoning regulations." JL1, tab 5.

C. Development Potential

1. Buildable upland. There was uncontradicted testimony, accepted by both courts below, that a particular portion of the parcel would have been approved as "at least" a single home-site, PA A-11; PA B-11, with a value (as of 1986) close to $200,000. PA A-13; PA B-9. Moreover, the State's appraisal expert showed that this would have netted greater proceeds, at less risk, than the $55,000 to be realistically hoped for by attempting the expensive and uncertain process of filling and subdividing.[30]

2. Possibility of approval for more. The record shows that another upland area on the parcel might also have been amenable to development with a variance as well. Test. of Council Director Fugate, RA 36-39; Test. of Engineer Clarke, RA 42; supported by maps in evidence showing a rise, see Ex. AA, Tr. 471-72, and high elevations in the area, see Ex. EEE, Tr. 650-51. It remains unclear how many lots the Coastal Council would have approved if Palazzolo had submitted a proper application incorporating the upland sections of his parcel.

VI. THE DECISIONS BELOW

In the 1980s, Palazzolo filed two separate civil actions challenging the State's denials. First, Palazzolo

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[30] *Compare* Test. of Appraiser Andolfo, JA. 101, appraising Palazzolo's parcel for subdivision purposes at $55,000 *with* Test. of Appraiser Andolfo, JA 103-04, appraising Palazzolo's parcel for single house purposes at $194,000. This testimony leaves no doubt that the appraisal and the court decisions crediting that appraisal were based on the underlying value of the parcel—*not*, as intimated by Palazzolo, *see* Pet. Br. 38, 40-41, the gross sale price of the house once built.

appealed under the State administrative procedures act resulting in a superior court decision upholding the agency. JA 31-42. Next, Palazzolo brought the instant takings claim in two successive complaints.

A. Superior Court. Presented with Palazzolo's seventy-four-unit residential development scheme, the trial court found that the filling and septic contamination resulting from the plan would constitute a public nuisance, PA B-11, and further ruled that the home-site's land value of $200,000 in 1986 dollars provided "beneficial use of the subject property." PA B-10, *see also* PA B-12 ("plaintiff has not lost all or even a substantial use of the subject property"). Although Palazzolo proceeded solely under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the superior court also found that Palazzolo did not meet the "investment-backed expectations test" of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), due to pervasive wetlands regulation known to him when he acquired the property. PA B-12.

B. Supreme Court. The Rhode Island Supreme Court held Palazzolo's claim lacked ripeness because he had failed ever to explore the possibility of developing the upland portions of his parcel. PA A-11. Although the court deemed its ripeness ruling "dispositive of the case," the court also "briefly" discussed the merits. PA A-12. The court explicitly endorsed the finding that the property retained economically viable use, noting that "*at least* one single-family home" could be built. PA A-11 (emphasis supplied). The court found Palazzolo's denominator assertion -- that the seventy-four-lot proposal would

yield $3,150,000 -- to be "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic." PA A-13 n.7. The decision was silent on the trial court's nuisance finding. The court also upheld the finding that Palazzolo's knowledge of the regulatory limitations on his property deprived him of *Penn Central*'s "reasonable investment-backed expectations" for such a development scheme. PA A-18.

SUMMARY OF ARGUMENT

Palazzolo's regulatory takings claim suffers from a multiplicity of dispositive defects. The Rhode Island Supreme Court correctly held that his complaint lacks ripeness on two separate grounds, and accurately explained why, even if ripe, Palazzolo had failed to prove a valid takings claim under this Court's decisions in *Lucas* or *Penn Central*. Moreover, the trial judge's undisturbed finding, not addressed by the Rhode Island Supreme Court, that Palazzolo's development proposal would have constituted a public nuisance, and the existence of other similarly dispositive defenses raised by the State below but not reached by the courts (*i.e.*, state public trust doctrine), confirm the justness and correctness of the judgment of the state courts.

1. Palazzolo's as-applied takings claim lacks ripeness. The minimum requirement for an as-applied takings claim is a "meaningful application" for development that provides the relevant governmental authority with a record for determining both the extent to which development is permitted and the site-specific reasons why any further development would be barred under existing law. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986). Palazzolo's

evasive, vague, incomplete, redundant, and grandiose applications fall far short of that standard. He has created a record that leaves unexplored the full extent of residential development permissible on his entire parcel, and that fails to establish the economic viability of the uses that he claims he was denied. Indeed, never before in the annals of this Court's takings law has a landowner demanded compensation for the government's denial of an application to engage in an activity that was not the subject of his claim for just compensation.

2. Equally lacking in merit is Palazzolo's claim that he has been denied all "economically viable use" of his property, within the meaning of this Court's *per se* takings test set forth in *Lucas*. The undisputed factual finding of the lower courts is that Palazzolo's parcel retains substantial economic value for residential use of at least $200,000. *See* PA A-12 to 13; PA B-5, B-9. Palazzolo failed to make the applications necessary to determine whether additional upland areas within his parcel may be susceptible to residential development, so the lower courts' judgment is very conservative. The state supreme court also correctly disputed Palazzolo's exaggerated allegations of lost profits of $3,150,000, which were wholly untethered to any realistic assessment of the actual costs of developing the parcel in the manner he proposed. *See* PA A-13 n.7. For that same reason, Palazzolo has failed to establish that any of the specific uses he was denied were themselves "economically viable."

3. The Rhode Island Supreme Court correctly concluded that when Palazzolo acquired the parcel in 1978, an absolute "right to fill wetlands was not part of the title he acquired." PA A-15. Any such inherent

right to fill coastal marshland property is denied by background principles of state law, as expressed in Rhode Island's comprehensive Coastal Resources Management Program ("CRMP"), longstanding common law and constitutional principles regarding public rights in tidal areas, and a series of antecedent regulatory programs. For this reason, Rhode Island's restrictions on Palazzolo's development would not be a taking under *Lucas* even if they had deprived him of all economically viable use of his property.

4. Finally, Palazzolo's newly-discovered reliance on *Penn Central* is misplaced. Not only did Palazzolo fail to raise this argument in the lower courts, but the state courts also correctly explained why, in all events, any such argument would lack merit. Palazzolo lacks the "interference with reasonable investment-backed expectations" needed to sustain such a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). When Palazzolo acquired his property in 1978, he could not possibly have harbored any reasonable expectation that he could develop the property in the manner he subsequently proposed. Not only did the pre-existing law clearly and precisely bar massive filling activities for such purposes, but the State had previously denied virtually identical applications filed by a preceding owner with which Palazzolo was closely affiliated.

ARGUMENT

I. PALAZZOLO'S AS-APPLIED REGULATORY TAKINGS CLAIM WAS NOT RIPE

The threshold premise of Palazzolo's claim of state court error in its ruling is his contention that "'[t]he

type and intensity of development legally permitted' on [his] 18-plus acres of land is perfectly clear: one single-family home and nothing more." Pet. Br. 11 (citation omitted). Palazzolo's premise is simply wrong. Although Palazzolo and affiliated entities have made multiple applications to fill coastal wetlands portions of his parcel, *see* Argument I.C., *infra*, the intensity of legally permitted development on his parcel is *not* known, let alone "perfectly clear." The failure to file a true and meaningful application[31] is what has compromised this record. The faults in Palazzolo's applications are that they (1) do not ask for permission to build the project he claims he was denied (and thereby evade state procedures and omit essential information), (2) do not contemplate the "whole parcel" of his land, and (3) are redundant and grandiose.

A. Palazzolo Failed to Apply for the Subdivision Proposal He Claims to Have Been Denied

Palazzolo failed to ripen his claim by deliberately obscuring the reasons why he sought to fill the coastal wetlands on his parcel. The applications for

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[31] To be "meaningful an application . . . must be essentially complete, must realistically describe the desired use, and must be reasonably current." *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991). *See, e.g., S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) (a property owner must give "indication . . . of how [it] might intend to develop the property if permitted to do so."); *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) ("a formal application . . . with adequate documentation about the density of the proposed development."). *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986) ("The implication is not that future applications would be futile, but that a meaningful application has not yet been made.").

development made by Palazzolo presumed no residential development at all. The first (1983) application was just for permission to fill the entire eighteen-acre wetland of parcel with fill. JA 10. At the Coastal Council, Palazzolo specifically denied any intent to try to construct the very seventy-four-unit residential development that is now the basis of his takings claim. *See* n. 28, *supra*. The second (1985) application was to fill most of the wetland (approximately twelve acres) for what was vaguely described as a project to construct a "beach." JA 25.

Hiding his purpose allowed Palazzolo to achieve four strategic advantages. First, Palazzolo dodged the necessary applications for ISDS and other permits required by state law prior to seeking the Coastal Council's permission to fill the coastal wetlands on his parcel. The permit process for septic systems in coastal wetlands would have clarified the costs of constructing the necessary septic systems (sharply contested at trial, JA 51-55) and removed any lingering doubt as to the "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic," PA A-13 n.7, nature of his subdivision proposal. Second, an administrative record on sewage would have allowed even better documentation of the adverse environmental spillover effects, such as the effects which led to the trial court's undisturbed finding that the proposal would constitute a "public nuisance." PA B-11. Palazzolo would be hard pressed to allege a taking for a permit denial based on sewage hazard to public waters and public health. *See Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926) (no property right exists to discharge sewage into public waters). Third, not seeking permission for the subdivision allowed him to

finesse the "public trust" issue of on whose land he was actually proposing to build. *See* nn. 59, 60, *infra*. Fourth, by leaving the uplands out of his application, but retaining them in the proposal that he claims as his value, Palazzolo is able to imply that the uplands themselves have adequate economic value only as part of a seventy-four lot parcel-wide subdivision scheme. Argument I.B, *infra*. (Here the "whole parcel," *id.*, and "meaningful application" problems converge.)

This maneuver also allowed Palazzolo to claim in the lower courts, and before this Court, "lost value" of $3.15 million, Pet. Br. 41, that is fanciful and unfounded.[32] Now Palazzolo characterizes his takings claim as relying only on the denial of the 1985 "beach" application and not on the 1983 application at all. Pet. Br. 8 n.3-4, 15 n.7. However, in the lower courts, the only subject of his claim of economic deprivation was his plan to fill the entire eighteen acres for an intensive residential subdivision development,[33] and it remains

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[32] Palazzolo's assertion of a $3,150,000 value to his development scheme is close to imaginary. No one outside his litigation team has ever given it any credence whatsoever. It was found by the Rhode Island Supreme Court to be grandiose, speculative and unrealistically optimistic, Statement of the Case VI.B, *supra*; the superior court thought so little of the $3,150,000 price tag that it ignored it outright; the government's witness found the project a "great folly," Test. of Appraiser Andolfo, JA 101; much of it would be constructed on state land, *see* nn. 59, 60 & public trust discussion in text, *infra*; its numerous assumptions, *see* JL1, tab 7, 22-23 are untested by the refiner's fire of a true application process, and there is no reason to believe it would have received necessary federal approvals. *See* n. 21, *supra*.

[33] *See, e.g.*, Test. of Palazzolo, RA 81 (Q. "But your claim [of a taking] before this Court today is based on residences and not a beach club, isn't that correct? A. Correct.").

the central basis of his financial allegations before this Court. Palazzolo has made no record whatsoever as to any economic value of the "beach."[34]

It does not seem unreasonable for the Rhode Island Supreme Court to require that Palazzolo must have at least applied for the development that serves as the subject of his as-applied takings claim. [35]

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[34] Nor is this surprising. As described by a government expert witness at trial, that proposal suffered from a total lack of practical purpose and logical link to the amount of contemplated fill. *See* Test. of Engineer Clarke, Tr. 650 ("[I]n order to get into the water, you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses to get to the water. And that's why I call it a so-called beach, because I have never experienced that on a beach before."). With the natural seashore of Misquamicut Beach across the road, this hardly seems like much of an attraction, and Palazzolo has never argued it had economic viability. The filling alone would likely cost in the millions of dollars. JL1, tab 9.

[35] Rhode Island courts are not ordinarily confined to ripeness rules developed by this Court, whether constitutional or prudential in derivation. This Court's Article III precedent is controlling only in federal court and cannot compel the assertion of jurisdiction by state courts. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 135-70. *Cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977) ("Illinois may choose to close its courts", suggesting that state and federal judiciaries operate independently in fashioning such rules). Nor did the Rhode Island court limit its analysis to this Court's precedent and federal law. The court repeatedly relied on its own state supreme court precedent in several respects, stressing "the principle that th[e] Court 'will not render advisory opinions or function in the abstract.'" PA A-9 (quoting *R.I. Ophthalmological Soc'y v. Cannon*, 317 A.2d 124, 130-31 (R.I. 1974)). The court further relied on Palazzolo's failure to comply with state administrative law requirements. PA A-12 n.6.

B. Palazzolo's Applications Exclude His Whole Parcel's Valuable, Dry Upland Areas

"The relevant question . . . is whether the property taken is all, or only a portion of the parcel in question." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993). Palazzolo's applications only address the wetlands portion of his site.[36] *See* JL1, tab 5 (1983 application); Ex. 8, Tr. 67, 330-31 (1985 application). His parcel does not consist only of coastal wetlands, but upland areas as well, and the state wetlands restrictions complained of do *not*

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[36] Palazzolo's 1983 application to the Coastal Council was clearly limited to the alteration (filling) of the wetland portion of his parcel. *See* 1983 Application, JL1, tab 5 ("proposal to restore property line, protect and prevent further erosion [&] to fill property to elvation [sic] 6.5 Ft., to prepare property for use as designated by zoning regulations"). As this application makes no reference to the construction of any "residential buildings . . . for human habitation," CRMP § 300.3, Palazzolo limited the Council's scope of review to a request for approval under § 300.10. *See* CRMP § 300.10, "Filling in Tidal Waters" (requiring a water quality certification from the Department of Environmental Management and assent from the Army Corps of Engineers as a prerequisite to receiving the Coastal Council's permission to fill below the mean high water mark). Again, Palazzolo's 1985 application was limited to the depositing of fill in the wetland portion of his parcel. *See* 1985 Application, Ex. 8, Tr. 67, 330-31 ("To place . . . fill . . . to establish a private beach club."). For the same reasons as above, Palazzolo necessarily was seeking approval under § 300.10. *See* CRMP § 300.10, "Filling in Tidal Waters." Palazzolo specifically was not seeking approval for any proposed activity with respect to the upland portion of his land. *See* 1985 Application, Ex. 8, Tr. 67, 330-31 ("There will be no filling of the existing high areas (roadway and small island to the west side of the area.)").

prevent building on upland portions of his parcel.[37] Not only does Palazzolo fail to encompass the whole parcel, but its limit to his highly-regulated wetlands suggests strategic behavior.[38]

Palazzolo made two applications to fill all or substantially all of his coastal wetlands, yet we still do not know the extent of upland, dry portions of his property.[39] Palazzolo acknowledges that at least one portion of his property includes upland, allowing him to build "one single-family home." Pet. Br. 14-15, 18. The record is not sufficient to support Palazzolo's further contention that the Coastal Council would permit "one single-family home and nothing more." Pet. Br. 13. The Supreme Court left open the possibility of more. PA A-11 ("at least" one single family home). Trial court testimony revealed that there might be additional upland portions on Palazzolo's eighteen

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[37] *See* Statement of the Case III.B.1.

[38] *See Tabb Lakes, Ltd., v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (limiting quantum of land considered to be wetlands creates "ipso facto" taking).

[39] The wetland boundary of Palazzolo's site is also obscure; there is "a substantial amount of land" under the waters of Winnapaug Pond, PA A-3, and "additional land is subject to daily tidal inundation and ponding." *Id.* Indeed, the record strongly suggests that the majority of the acreage is below the mean high water mark. JL2, item 1 (showing elevations; all elevations below 1.72 are below mean high tide line). *See also* n.9, *supra*. Mean high water mark is significant both because it is indicative of the aquatic nature of the property -- and therefore the adverse spillover effects associated with its development -- and because it means that Palazzolo's title in the property is limited by state ownership. *See* nn. 59, 60, *infra*.

acres that would support three or four additional lots.[40] Indeed, the State even proposed an offer of judgment at trial based on testimony suggesting that as many as eight of the lots on the parcel contained developable uplands. *See* Tr. 209-10, 258-60.

What the Coastal Council would conclude if it had an application that allowed it to consider upland portions of the acreage is not, of course, clear. But the very purpose of the judicial ripeness requirement is to allow for those determinations to be made in the first instance by the regulatory agency and not based on judicial speculation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 190-191 (1985).

C. Palazzolo's Filings Were "Exceedingly Grandiose" and Redundant

"[R]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986). Despite Palazzolo's suggestions that he has exhausted himself in applications to the point of

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[40] Government witnesses at trial testified both to the possibility of further upland portions of the property for which a "special exception" was not required for residential development, and to how Palazzolo's lack of a survey for that purpose precluded the Coastal Council from knowing for sure. *See, e.g.*, Test. of Council Director Fugate, RA 36 ("There may, and again, because we don't have an accurate or detailed survey, there may be other upland portions that are immediately adjacent to Atlantic Avenue, but that can't be determined."); Tr. 209 ("there may be other upland areas on the backside of those houses along Atlantic Avenue that might have sufficient upland. . . ."); Test. of Engineer Clarke, RA 42, 44 ("the site has two upland areas" and "realistic to apply for those locations").

futility, in point of fact he applied only for his "beach" and "erosion control," hiding the seventy-four-lot subdivision proposal. Even though Palazzolo never applied for any intermediate use, and even though he avoided any application including his buildable uplands, nevertheless, the record we have just discussed supports the likelihood of some less grandiose beneficial use. Before the possibility of some intermediate use is ruled out, applicants should meet some burden of coming forward in good faith, candidly disclosing their intentions, and using the whole parcel of their property.[41]

To the extent that Palazzolo references or relies on SGI's applications from the 1960s, they add little to his case, having been found to be "nearly identical" with his 1980s applications. Statement of the Case ("Statement") V.B, *supra*. As found by the courts below, the application denials predating his ownership of the property are not proof of futility, but of dramatically inhibited reasonable investment-backed expectations. *See* PA B-12 ("he knew"); PA A-18 ("he had no reasonable investment-backed expectations that he could develop a 74-lot subdivision"); *See* Argument IV, *infra*. Under *Lucas*, since the state supreme court "rested its judgment on ripeness grounds," *Lucas*, 505 U.S. at 1011, the fact that *Palazzolo* "may yet be able to secure permission to build on his property," *id.*, should "preclude review." *Id.*

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[41] The paucity of the record is due to the applicant's stratagems, and should not be held against the State, lest strategic filing behavior be encouraged. This problem is emerging since *Lucas*. *See, e.g., Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 72-75 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied sub nom. RCK Properties, Inc. v. United States*, 528 U.S. 951 (1999).

Our final observation on ripeness is that a court is entitled to congruity[42] between the issue presented on the merits and the issue presented for ripeness determination. If an applicant drastically narrows his argument to achieve a "ripe" question (for instance that mere refusal to allow him to fill wetlands is a taking),[43] that is the question he should address on the merits. Palazzolo tries to fly in under the ripeness radar with just such a narrow claim, and then once in, implicate numerous unripe issues. He cannot have it both ways.

II. PALAZZOLO'S CLAIM THAT HE HAS BEEN DENIED ALL "ECONOMICALLY VIABLE USE" OF HIS PARCEL LACKS MERIT

Palazzolo's sole argument to the courts below was that the Coastal Council's denial amounted to a *per se*

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[42] For this same reason, Palazzolo's reliance *see* Pet. Br. 18, on the Texas Supreme Court's decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) is misplaced. In that case, the landowner's application coincided with his claim of value, and his ripeness question and his question on the merits converged "[b]ecause the proper owners in *Mayhew* were willing in essence to concede that permission for less intensive development might be granted, while at the same time denying that such permission would avert a regulatory taking." Pet. 17. (emphasis removed). Palazzolo makes no such concession and cannot similarly claim ripeness.

[43] To the extent Palazzolo hints at a facial challenge to Rhode Island's Coastal Resources Management Plan, he would run squarely into a "rational basis" for the protection of coastal wetlands under the Due Process Clause, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938), and a substantial advancement of legitimate state interests under *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

taking under *Lucas*.[44] Palazzolo, however, cannot establish what *Lucas* requires: that the Coastal Council deprived him of all "economically viable use of his land." 505 U.S. at 1016. First, he cannot show that there is no economically viable use remaining. The parcel was bought for a "total initial investment of $13,000," PA B-12,[45] has a minimum permitted value of $200,000 in 1986 dollars, PA B-5; PA A-12 to A-13, and may be amenable to further development. Statement V.C. That is not an elimination of all (or nearly all) value. Second, Palazzolo cannot show that his proposed uses were themselves "economically viable." Argument II.B, *infra*. A governmental agency cannot be fairly deemed to have denied a landowner

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[44] Plaintiff's Post-Trial Mem. 6 ("This Court need not look beyond the *Lucas* case"); Br. of Appellant 5 (same). There are some key factual differences from *Lucas* Lucas 's property went from $975,000 to "valueless," *Lucas*, 505 U.S. at 1006, 1007; Palazzolo's from $13,000 to at least $200,000. PA B-12, B-5. Lucas's regulation was imposed after acquisition, 505 U.S. at 1008; Palazzolo's pre-existed his acquisition of the parcel. Statement III.B, IV, *supra*. Lucas's proposed use was a single-family residence, "what the owners of immediately adjacent parcels had already done," 505 U.S. at 1008; Palazzolo proposes an unprecedented incursion on the pond he and his neighbors share to install a seventy-four-lot subdivision. *See* n.7, *supra*.

[45] The record is once again less than crystal clear on this point, and once again Palazzolo is to blame. By only advancing a *Lucas* argument below, he avoided *Penn Central*'s "economic impact" analysis and the relevant record as to his investment and return. We know that SGI owned the property at the times of the investment of $13,000, and sold off a number of lots, but the amount of the sales was never made a matter of record, and so the "total initial investment" calculated by the Superior Court did not offset any profits from lots sold. PA B-12.

economically viable use if the use denied is not economically viable in the first instance.[46]

A. Palazzolo's Parcel Retains Substantial Economic Value for Residential Use

In *Lucas*, this Court announced a *per se* regulatory takings test applicable only in extreme and "relatively rare" circumstances, 505 U.S. at 1018, when the government by regulation "denies an owner economically viable use of his land." *Id.* at 1016 (citation and internal quotation marks omitted). The Court concluded that only "deprivation of *all* economically feasible use" is the constitutional equivalent of a physical appropriation of the property by the government. *Id.* at 1017 (emphasis supplied). "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his parcel economically idle, he has suffered a taking." *Id.* at 1019 (emphasis supplied).[47] This accorded with earlier

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[46] Non-viable uses should be a rarity, were it not for the incentive takings litigation provides landowners to engage in strategic behavior to manufacture a "taking." This problem dissipates when the proposed use is put through the refiner's fire of a true and meaningful development application for the whole parcel.

[47] The Court in *Lucas* specifically accepted the "all-or-nothing" character of the *per se* categorical takings test being adopted, 505 U.S. at 1019 n.8 ("[i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full"), noting that the *Lucas* "categorical formulation" does not preclude a landowner from seeking to establish a taking under a different analysis, such as the multi-factor approach in *Penn Central*. Palazzolo expressly disavowed in the lower courts any reliance on any takings test other than the *Lucas per se* test. *See* note 44, *infra*.

language that regulation can be a taking only when it "totally destroys the economic value of property." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

By Palazzolo's own acknowledgment, he can make economically viable use of his parcel. Pet. Br. 13. "[T]he uncontradicted evidence was that [the Coastal Council] . . . *would not* deny [Palazzolo] permission to build one single-family home" on his parcel. *Id.* (emphasis in original). This is certainly "one step short of a complete deprivation" of use, *Lucas*, 505 U.S. at 1019 n.8, indeed, a long step short.

Because of the ripeness problems, *supra*, the record can only suggest that the Coastal Council may permit as many as three or four more upland lots. *See* Argument I.B, *supra*. Having never formally pursued or been denied upland development, Palazzolo cannot fairly contend before this Court that it has been "taken." We have already discussed the "undisputed evidence . . . that had [Palazzolo] developed the upland portion of the site, its value would have been $200,000," PA A-12 to A-13; PA B-5 (trial court finding), and that this was a minimum value for the parcel. PA A-11 ("at least" one home site). It is this Court's long-established practice not to disturb such factual findings when upheld by both lower courts[48] and there is no reason here to doubt the validity of their findings. Whatever the upper limits of economically "productive,"

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[48] *See, e.g., NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 97 n.15 (1984); *Rogers v. Lane*, 458 U.S. 613, 623 (1982); *United States v. Dickinson*, 331 U.S. 745, 751 (1947); *United States v. Commercial Credit Co.*, 286 U.S. 63, 67 (1932); *United States v. Chem. Found.*, 272 U.S. 1, 14 (1926); *Baker v. Schofield*, 243 U.S. 114, 118 (1917); *Towson v. Moore*, 173 U.S. 17, 24 (1899).

"beneficial," or "viable" use of Palazzolo's whole parcel may be, there is no serious issue that at least some residential development, possessing substantial value, would be permitted.[49]

To the extent the Court wishes to assess value in terms of a ratio rather than an absolute number, it should consider the problems with Palazzolo's improbable "denominator" of $3,150,000. *See* n.32, *supra*; n.50, *infra*. It may also wish to consider his "total initial investment" in this property of $13,000. PA B-12.

B. Palazzolo Failed to Establish That His Development Uses Were Themselves "Economically Viable"

As we have shown, Argument I.A; nn.32, 34 *supra*, there is also no plausible record to support that Palazzolo's speculative development proposals were "economically viable." The government's appraisal expert ultimately concluded that Palazzolo would have to expend "in excess of four million dollars in construction costs"[50] for a "net overall value of

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[49] Contrary to Palazzolo's characterization of the decision of the state supreme court, Pet. Br. 38-41, that court never intimated that so long as the parcel retains some market value above zero, it necessarily possesses economically viable use. The issue presented to the court in this case was whether use of the parcel, which would give the parcel at least a value of $200,000 (as of 1986), was a *Lucas per se* taking. The state supreme court nowhere intimated that it was assuming that Palazzolo could only receive some nominal value above zero.

[50] Government experts described the scope of the task of filling in approximately eighteen acres of coastal marshland with eight feet of fill. *See* Test. of Engineer Clarke, Tr. 554, 594-99; *see also* Preparation and Development Costs, JL1, tabs 9-10. With so much

$55,000." JA 101. In what must be deemed an understatement, he described such an undertaking as a "great folly." JA 101. The "beach" proposal fares no better. *See* n.34 & accompanying text, *supra*. In short, no agency or court in these proceedings has ever given the economic viability of Palazzolo's projects the slightest credence, and the record underlying the judicial skepticism is equally damning.

Because Palazzolo has neither established that his property is valueless under the regulations, nor established an economically viable proposal, his claim lacks merit.

III. PALAZZOLO'S CLAIMS ARE BARRED BY RESTRICTIONS THAT PREDATE HIS ACQUISITION

Under *Lucas*, even a regulation that deprives a landowner of all economically viable use is not unconstitutional "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. This Court further stated, "[a]ny limitation so severe cannot be newly

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acreage below mean high water mark, the construction would have required at least 250,000 cubic yards of fill and the dredging out over 60,000 cubic yards of existing muck. *See* Test. of Engineer Clarke, Tr. 554, 594-599; *see also* Test. of Engineer Caito, Tr. 264, 274-77, 279-81. The engineering and appraisal experts considered the feasibility of various septic systems, the limitations imposed by local zoning laws, the requirement that construction, for the most part, would have to be on stilts, the type of infrastructure needed, and market prices prevailing at the time. *See* Test. of Engineer Clarke, Tr. 554, 562-77, 603, 606; Test. of Appraiser Andolfo, Tr. 661, 667-73; JL1, tabs 9 and 10.

legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

The Supreme Court of Rhode Island affirmed the trial court's finding that "the right to fill the wetlands was not part of Palazzolo's estate to begin with," PA A-13, and itself found that "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." PA A-15. This is a state law determination entitled to this Court's respect. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (constitutional property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). This determination is also well-founded.

A. Antecedent "Background Principles of State Law" Are Significant Under *Lucas*

Sequence matters. This Court's opinion in *Lucas* referred to limitations on land use that were "*newly* legislated or decreed," 505 U.S. at 1029 (emphasis supplied). (In *Lucas* the acquisition of the property preceded the regulation applied.) *Lucas* distinguished between regulatory action that does and does not "proscribe a productive use that was *previously* permissible under relevant property and nuisance principles." *Id.* at 1029-30 (emphasis supplied). Indeed, the very term "background" in "background principles" has an obvious temporal element, by

focusing on those "social, historical, and other *antecedents* . . . of an event or experience." *Random House Webster's Unabridged Dictionary* 151 (2d ed. 1997) (emphasis supplied). Thus, as an opening proposition, the Rhode Island Supreme Court was plainly correct in rejecting Palazzolo's "argument that the time of acquisition is irrelevant" to regulatory takings analysis. PA A-16.[51] As this Court expressly acknowledged in *Lucas*, common law principles may, "because of changed circumstances or new knowledge . . . make what was previously permissible no longer so." 505 U.S. at 1031 (quoting Restatement (Second) Torts § 827 cmt. g).

Palazzolo's contrary view is based on an erroneous and extreme image of property.[52] According to

[51] Palazzolo wrongly posits, Pet. Br. 22-23, that this Court in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 833 n.2 (1987), previously ruled that the timing of an individual's acquisition of property is wholly irrelevant to the "background principles" of law inquiry under *Lucas*. The Court in *Nollan*, however, cannot be fairly deemed to have answered a legal issue not posed until *Lucas* five years later. The Court's rationale in *Nollan* arose from circumstances where the government, by permit exaction, sought to appropriate a permanent easement for the public across the landowner's beachfront property, which the Court deemed the legal equivalent of the government's "permanent physical occupation" of the land. *Nollan*, 483 U.S. at 832. The *Lucas* Court answered the question whether notice is relevant by agreeing that an otherwise *per se* taking may be defeated by "background principles." 505 U.S. at 1029. The only remaining issue concerns how those "background principles" are defined, which was an issue not addressed in *Nollan*.

[52] Indeed his absolutist property views are at odds even with Locke, who recognized "Man['s] . . . uncontroleable Liberty, to di[s]po[s]e of his Per[s]on or Po[ss]e[ss]ions," John Locke, *Two Treatises of Government* 168 (photo. reprint 1992) (1698) (spelling

Palazzolo, allowing background principles of law to change over time would be "Antithetical" to the "History and Structure of the Constitution" because government could "Acquire the Right to Use and Develop Property Without Paying Just Compensation."[53] Pet. Br. 24. Palazzolo's fundamental mistake is his assumption that whenever the government *restricts* a landowner from using his parcel in a particular way the government has, in effect,

and capitalization in original except as indicated). Palazzolo's extreme view also sharply diverges from that of Blackstone, who acknowledged that man in his natural state had "the ab[s]olute and uncontroled power of doing whatever he plea[s]es," 1 William Blackstone, *Commentaries on the Laws of England* 121 (photo. reprint 1979) (1765) (spelling in original except as indicated), but also recognized that "every man, when he enters into [s]ociety, gives up a part of his natural liberty, as the price of [s]o valuable a purcha[s]e." *Id.* Indeed, said Blackstone, "the principal aim of [s]ociety is to protect individuals in the enjoyment of tho[s]e ab[s]olute rights . . . which could not be pre[s]erved in peace without . . . [s]ocial communities." *Id.* at 120 (spelling in original except as indicated). *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting) ("the advantage of living and doing business in a civilized community").

[53] The history of American law is one of change however. As described by Oliver Wendell Holmes more than a century ago: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, *The Common Law* (1881), *reprinted in* 3 *The Collected Works of Justice Holmes* 115 (Sheldon M. Novick ed., Univ. of Chicago Press 1995). Even the expansion of takings law by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1992), beyond "direct appropriation," *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871), would seem to be one such development in constitutional law.

acquired the right to use the property in that same manner itself. That is simply not so.[54]

B. The Relevant "Background Principles of State Law" Under *Lucas* Are Not Confined to Those Supplied By Common Law Doctrine

Lucas leaves ambiguous the extent to which "background principles" must derive from the common law, to the complete exclusion of other

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[54] Palazzolo's zero-sum, binary proposition that everything he is not permitted to do is necessarily transferred to the State, is inconsistent with law and logic. First, there is a public interest apart from the State's proprietary or governmental interests, as reflected in doctrines such as nuisance, public trust, and rights of the shore that are "background principles" to title in land in Rhode Island. Second, there are situations, exemplified by the "tragedy of the commons," *see* Garrett Hardin, *The Tragedy of the Commons*. 162 Science 1243 (1968), where the State's only interest is as a neutral arbiter of conflicts that nature, and neighbors, present. There is reciprocity of advantage where common amenities are protected (such as, to all of its neighbors, the scenic, recreational and other amenities of Winnapaug Pond), or where "independent pursuit by each decision-maker of its own self interest leads to results that leave all decision-makers worse off." Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1211 (1977) (describing tragedy of the commons). Takings law that did not respect well-settled statutes would disrupt the well-settled and investment-backed expectations of nearby property owners, and at the extreme would require payment for every such limited use. "[W]ere the exerci[s]e of every virtue to be enforced by the propo[s]al of particular rewards, it were impo[ss]ible for any [s]tate to furni[s]h [s]tock enough for [s]o profu[s]e a bounty." 1 William Blackstone, *Commentaries on the Laws of England* 56 (photo. Reprint 1979) (1765) (spelling in original except as indicated). And with so profuse a bounty, who would not bluff their desire to exercise the virtue enforced?

sources of law. Before this Court, Palazzolo apparently contends that the only relevant law is the common law of easements and nuisance.[55] *See* Pet. 6. We disagree. We think the better view is that *Lucas* takings can appropriately be limited by other sources of law, particularly (as here) statutory and regulatory provisions that derive from background common law principles.[56]

Certainly, *Lucas* did not foreclose that background principles extend beyond the common law. The majority did not say that the limitation that "inheres in the title itself" cannot be "legislated," but that it could not be "*newly* legislated." 505 U.S. at 1029 (emphasis supplied). The Court also did not refer just to nuisance law, but to relevant background principles "of the State's law of *property*" as well. *Id.* at 1029 (emphasis

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[55] Even if the only relevant background principle were nuisance law, the judgment below should still ultimately be affirmed. The trial court held that Palazzolo's proposed use of the property amounted to a common law nuisance under Rhode Island law. *See* PA B-11.

[56] As stated by Justice Kennedy in his concurring opinion in *Lucas*, "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." 505 U.S. at 1035 (Kennedy, J., concurring in the judgment). For instance, some statutory and regulatory schemes codify and otherwise derive from common law principles, to the benefit of property owners, by providing an orderly forum for advance approval of development proposals, rather than requiring applicants to proceed at their own risk of injunction and abatement. To the extent the State enforces common law principles by regulation, property owners further benefit by uniformity and certainty of protection, rather than protection hinging on who has neighbors with the temperament and funds to commence a nuisance, public trust or other common law action.

supplied). Many sources of law may shape and define private property rights. See nn. 59, 60, *infra* (public trust doctrine). Certainly no one could seriously maintain that state law grounded in a state's *constitution*, but not in its common law, was irrelevant to the background principles inquiry. *See, e.g.*, R.I. Const. art. 1, § 17 (rights of fishery and shore).

We have no expression by this Court that legal rules based on the common law are superior to those based on statute. After all, "the great office of statutes is to remedy defects in the common law as they developed, and to adopt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). *Cf. United States v. Causby*, 326 U.S. 256, 260 (1945) ("It is ancient doctrine that at common law ownership of land extended to the periphery of the universe. . . . But that doctrine has no place in the modern world.").[57]

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[57] The highest courts of states to address the issue readily agree with the common sense proposition that common law principles cannot be the exclusive source of "background principles" of law relevant under *Lucas*. *See, e.g., Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994); *Soon Duck Kim v. City of New York*, 681 N.E.2d 312, 318 (N.Y. 1997); *Wooten v. South Carolina Coastal Council*, 510 S.E.2d 716, 718 (S.C. 1999); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 420 (Va. 1998). Even the cases cited by Palazzolo, Pet. Br. 32, do not support his legal theory that the only relevant source for discerning "background principles" is common law doctrine. While those cases do not endorse the notion that all land use restrictions imposed by pre-existing statutes and regulations automatically bar a *Lucas per se* taking, none support Palazzolo's claim that such pre-existing laws are *not* a relevant factor to be considered at all. Indeed, in quoting from the cases, Palazzolo omits the second half of the sentence from the Colorado Supreme Court's opinion in *Cottonwoods Farms v. Bd. of County Comm'rs. of County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988), in which the state court adds that a "majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations . .

Statutes build upon and develop the common law based upon the very "changed circumstances or new information" that this Court acknowledged in *Lucas* could be the legitimate basis of changes in the common law itself. 505 U.S. at 1031 (quoting Restatement (Second) of Torts § 827 cmt. g). Most simply put, "[f]or almost a century now, legislators – with judicial acquiescence – have taken over the task of refining and specifying the range of acceptable landowner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis." Carol Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 281 (1996). Thus, "it is particularly misleading to look simply to common-law judicial definitions of nuisance as the basis for modern property rights." *Id.*

The statutes and regulations at issue illustrate this historical relationship. Long before the Rhode Island legislature enacted the Rhode Island Coastal Resources Management Act of 1971, 1971 R.I. Pub. Laws ch. 279, land use development in the coastal marshes was restricted. *See* Section C, *infra*. The 1971 statute, as supplemented by the Coastal Council's Coastal Resources Management Program, simply implemented those longstanding principles[58] in a comprehensive and

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. *does constitute a factor* to be considered in evaluating the claims of invalidity" (emphasis supplied). *See also Karam v. N. J. Dep't of Envtl. Prot.*, 705 A.2d 1221, 1229 (N. J. Super. Ct. App. Div. 1998) ("plaintiffs could not have reasonably expected that they would be immune from all changes in the law during that period.").

[58] Palazzolo treats the public purpose of the State's regulations as enhancing his taking claim. The public nature of the State's goals in regulating wetlands cuts in several directions. First, a public purpose is necessary for there to be a compensable taking at all:

consistent fashion. The overlap is plain in this very case: the trial court, found the use Palazzolo claims was taken from him by regulation to be so harmful as to be barred by the state's common law public nuisance doctrine. PA B-11.

C. Under *Lucas*, Background Principles Supplied By State Law Defeat Any Takings Claim

The state supreme court was correct that under Rhode Island law at the time of Palazzolo's purchase "the right to fill wetlands was not part of the title he acquired." PA A-15. The state court properly relied on the comprehensive state coastal management program existing at the time of Palazzolo's acquisition, whose plain terms made clear at that time that state law would bar the massive filling of coastal wetlands he later proposed.

In this case, the constitutional, statutory, and common law pedigree of the state's regulatory program compels the Rhode Island Supreme Court's decision. This is not an instance in which a state has dramatically and suddenly changed law to the frustration of settled expectations of property owners.

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property cannot be taken except for public purposes. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *City of Newport v. Newport Water Corp.*, 189 A. 843, 846 (R.I. 1937). The fact that a taking demands a public purpose does not prove the converse. Indeed, under the *Penn Central* test, public purposes such as preventing harm to the public health and safety will make a regulatory taking *less* likely. *Penn Central*, 438 U.S. at 124. Last, *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980), inquires whether the regulatory regime substantially advances a legitimate state interest. Where it does, the regulation is more likely to withstand a takings challenge. *Id.*

As described *supra* Statement III.B, the 1971 statute applied to Palazzolo's parcel in this case is directly traceable to a series of state statutory programs in existence for decades before then, and is even more deeply rooted in state common law and constitutional principles which, throughout Rhode Island's history, restricted the very kind of injurious fill activities Palazzolo sought to undertake. The extent of these historical restrictions shows that filling of coastal wetlands "has long been the source of public concern and the subject of governmental regulation" in Rhode Island. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

First, and most obviously, the trial court below expressly found that Palazzolo's proposed uses would amount to a nuisance under the common law because of the serious harm from such a development. PA B-10, B-11. Interfering with wetlands is clearly subject to the law of nuisance under Rhode Island law. *See Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59-60 (R.I. 1980). *Cf. Payne & Butler v. Providence Gas Co.*, 77 A. 145, 153 (R.I. 1910) (interference with shellfish beds deemed a nuisance); R.I. Gen. Laws ch. 118 § 14 (1896) (fill in navigable waters subject to law of nuisance). Nuisance uses are not compensable. *Mugler v. Kansas*, 123 U.S. 623, 668-69, 670-71 (1887).

Second, layers of state constitutional and common law dramatically restrict filling and other private rights in tidal wetlands. Rhode Island's constitution protects the public's "right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *see Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941); *Clarke v. City of Providence*, 15 A. 763, 765-66 (R.I. 1888). This section was in the state's original 1843 constitution, which incorporated

rights dating back to our Royal Charter of 1663 (granting "our loving subjects . . . liberty . . . upon said coast"). Rhode Island Royal Charter of 1663, *repealed by* R.I. Const. of 1843, *available at* http://www.state.ri.us/rihist/richart.htm. *See also* R.I. Const. art. 1 § 16 (exempting from state takings clause the regulation of tidal wetlands).

These constitutional rights are of such force that the question usually argued is whether the State even has the power under the constitution to authorize private landowners to fill in tidal wetlands. *See, e.g., Jackvony*, 21 A.2d at 556 (public "'rights,' beyond the power of the general assembly to destroy"); *Clarke v. City of Providence*, 15 A. at 764, 765-66. Even in cases where the Rhode Island Supreme Court approved of the State's power to relinquish the public's trust rights, *see, e.g., Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041-44 (R.I. 1995), this has only emphasized that these are not rights belonging to the landowner.

Rights recognized by the common law overlap with those enshrined in the state constitution. Rhode Island endorses the public trust doctrine,[59] *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259-60 (R.I. 1999), granting the state a fee interest in tidal wetlands.[60] The public trust doctrine has been codified in harbors and rivers laws and regulations, such as was exercised over SGI's 1960's applications. Under both the common law and regulatory practice dating back centuries, Rhode Island law has never recognized full title of riparian owners in tidal lands, and there is no right to fill. *Dawson v. Broome*, 53 A. 151, 157 (R.I. 1902). The State holds the property in public trust, and may give riparian owners permission to fill. *Id.* at 156.

[59] "Under the public-trust doctrine, 'the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.'" *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999) (citation omitted). "'In this state, at common law, the fee of the soil in tide waters below high-water mark is in the state.'" *Dawson v. Broome*, 53 A. at 156 (quoting *Bailey v. Burges*, 11 R.I. 330, 331 (1876)). *See also, e.g., Gerhard v. Bridge Comm'rs*, 5 A. 199, 200 (R.I. 1886) ("as trustee for public purposes"). The various harbor and river agencies granting leave to fill tidal wetlands (including the entity that denied SGI's applications in the 1960s) did not restrict a property right of the owner to fill (as none existed), but rather gave permission or acquiescence of the State yielding the public's rights in such areas. *See Dawson*, 53 A. at 156. The connection we assert among

Finally, if a true and meaningful application for a seventy-four-lot subdivision had been filed, it would

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common law, statute, and regulation, *supra* at Argument III.B$_4$ was closed further by legislation establishing fill in public trust lands not authorized by the state to be "deemed to be a public nuisance." R.I. Gen. Laws ch. 118, § 14 (1898), *quoted in Dawson*, 53 A. at 155.

[60] The antecedent state law of public trust, even though not reached by the state courts, applies without question to Palazzolo's land below the high tide mark. *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895) (applying the public trust doctrine to a "thatch bed," *i.e.*, salt marsh). *Cf.* Alfred Redfield, *Development of a New England Salt Marsh*, 42 Ecological Monographs 201 (1972) (explaining the meaning of the term "thatch"). As a riparian owner, Palazzolo would have certain very limited property rights, which would not support a takings claim for the denial of such filling. 32 A. at 166 ("These [private riparian rights] do not amount to seisin in fee, but are in the nature of franchises or easements."); *accord Rhode Island Motor Co. v. City of Providence*, 55 A. 696 (R.I. 1903). The riparian owner has only "a sort of inchoate or potential title by virtue of his right to fill out under leave of the state." *Dawson v. Broome*, 53 A. at 157. In *Gerhard v. Bridge Comm's.*, 5 A. 199 (R.I. 1886), the riparian landowner sought "just compensation" based on the State's physical invasion of such land, namely constructing the pier of a bridge. The court refused, noting that the soil on which the pier rested belonged to the State. *Id.* at 200.

have implicated the sewage control authority of the State. Even good and clear title does not confer on a Rhode Island landowner a property right to emit sewage. *Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). These legal doctrines are all underpinned by ancient equitable maxims recognized in Rhode Island: "Sic utere tuo ut alienum non laedas," *Horton v. Old Colony Bill Posting Co*, 90 A. 822, 837 (R.I. 1914), and "salus populi est suprema lex" *R.I. Dep't of Mental Health, Retardation & Hosps. v. R.I. Council 94, AFSCME*, 692 A.2d 318, 325 (R.I. 1997).

The depth, consistency and antiquity of the background principles of state law applicable in this case support the state court's conclusion that those state law principles, carried forward into the regulations complained of, preclude any claim under *Lucas*. Under Rhode Island law, the title that Palazzolo obtained when he acquired the parcel in 1978 did not include the inherent right to develop the property by filling the parcel's coastal wetlands.[61]

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[61] Alternatively, Palazzolo could not maintain a viable takings claim under *Lucas* even if the restrictions imposed by Rhode Island went beyond historically-rooted background principles. Just as the lack of reasonable investment-backed expectations may be "so overwhelming" as to be dispositive of a takings claim under *Penn Central, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), it may be likewise preclusive of a claim under *Lucas*. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994); *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct.1554 (2000). As described in Argument IV, *infra*, the clarity and settled character of the state law restrictions on development at the time of Palazzolo's acquisition deprived him of any reasonable investment-backed expectations that he could develop the parcel in the manner he later proposed, regardless of their roots in background principles of state law.

IV. *PENN CENTRAL'S* ANALYSIS DOES NOT SUPPORT PALAZZOLO'S TAKINGS CLAIM

Although Palazzolo expressly confined his takings challenge to his claim of a *per se* taking under *Lucas*,[62] the Rhode Island Supreme Court nevertheless described how Palazzolo would not have succeeded had he relied on the test set forth in *Penn Central*. *See* PA A-17. Under *Penn Central*, the three factors relevant to the judicial inquiry are "the economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The Rhode Island Supreme Court addressed only the "investment-backed expectations" factor,[63] *see* PA A-17, A-18, and concluded that Palazzolo's "lack of reasonable investment-backed expectation is dispositive" of any possible takings claim. PA A-17. The court relied on the trial court's finding to that

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[62] *See* n. 44, *supra*.

[63] In some circumstances, the force of just one of the three factors can be so overwhelming as to be dispositive of the takings inquiry. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), the Court held that the "character of the governmental action" -- there a "permanent physical occupation" of private property by a sovereign -- was enough to justify a finding that an unconstitutional taking had occurred. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), the Court held that consideration of the government's "interference with reasonable investment-backed expectations" was sufficient to dispose of a takings challenge. And, of course, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court focused exclusively on the "economic impact" of the challenged regulation.

effect, which was rooted in the further finding that when Palazzolo acquired the parcel, "there were already regulations in place limiting [his] ability to fill the wetlands for development." *Id.*

In 1978, when Palazzolo acquired the parcel, Rhode Island had in place a comprehensive program for land use management in the coastal areas where Palazzolo's parcel was located. The Coastal Resources Management Program identified, in clear and precise terms, the very kind of property Palazzolo owned and the restrictions necessary on development in such areas based on the sheer fragility of the surrounding ecosystem. *See* Statement III.B; *supra;* PA A-17. There was absolutely no suggestion in the existing regulatory scheme that the kind of massive filling contemplated by either Palazzolo's 1983 or 1985 proposal would be permitted for an intensive residential subdivision, "erosion control," or the so-called "beach."

Wholly apart from the proper scope of "background principles" of law under the *Lucas per se* takings test, there can be no doubt of the validity of the state court's conclusion that such pre-existing legal restrictions can defeat the reasonableness of a landowner's investment backed expectations.[64] *See* PA A-17. The challenged regulatory program preceded his ownership, and

[64] Any reliance Palazzolo places, *see* Pet. Br. 3, on the Town of Westerly's zoning of the relevant parcel for subdivision development is entirely misplaced. The town's action cannot limit the sovereign power of either the State or the federal government to impose their own restrictions on development. Moreover, in Rhode Island, a developer does not obtain a vested right until a building permit has been issued and construction has begun. *Shalvey v Zoning Bd. of Review*, 210 A.2d 589, 593-94 (R.I. 1965); *Tantimonaco v. Zoning Bd. of Review*, 232 A.2d 385, 387 (R.I. 1967); *see also Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 51 (D.R.I. 1993).

simply made plain what landowners, including Palazzolo, had long known about their limited ability to fill coastal marshland. Indeed, Palazzolo's predecessor corporation, SGI, had sought and been denied permission to do just what he then proposed in nearly identical new filings.[65]

Neither of the other two *Penn Central* factors would support a finding of a taking here. Palazzolo's "economic impact" claim is based on a speculative allegation of lost profits mightily disbelieved by the courts below (*see supra* n.32; Statement VI.B, *supra*). The "character" of the governmental action at issue here, moreover, involves the very kind of governmental action sustained in *Penn Central*. "[T]he [development restriction] neither exploits [Palazzolo's] parcel for [governmental] purposes nor facilitates nor arises from any entrepreneurial operations of the [State]." *Penn Central*, 438 U.S. at 135. "This is no more an appropriation of property by government than is a zoning law . . . ." *Id.*

Indeed, the law challenged in this case provides the very kind of "reciprocity of advantage" (because it "applies to a broad cross section of land") that the *Penn*

[65] One *amicus* posits that this Court's taking analysis in *Lucas* and other recent court decisions refine and effectively supersedes the analysis previously set forth by the Court in *Penn Central*. *See* Br. *Amicus Curiae* of Board of County Commissioners of La Plata County. Because we do not believe that the Court need reach that issue to dispose of this case, we do not address that distinct argument ourselves, other than to note it as an alternative basis for rejecting Palazzolo's *Penn Central* theory. Likewise, it is being suggested by the same *amicus* that Rhode Island's sovereign immunity provides an alternative basis for upholding the judgment below. *Alden v. Maine*, 527 U.S. 706 (1999), represents an important new legal development that the State could not fairly have been required to anticipate in the context of this case.

Central dissent acknowledged was sufficient to defeat a regulatory takings claim. *See id.* at 147 (Rehnquist, J., dissenting). Palazzolo, like other landowners in the area, has been both benefited and burdened by the development restrictions. All have investment-backed expectations about what can and can not be done in the heavily regulated wetlands. [66] All are to a degree interdependent. By enforcing long-settled state law through the regulatory process, the state protects those expectations, and averts the "tragedy of the commons" that otherwise would threaten the resource with total destruction, to the detriment of everyone, including Palazzolo.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

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[66] Somewhat ironically, Palazzolo's initial complaint in this case acknowledges the dependency of his parcel's value on strict enforcement by the government of permit restrictions, and the interdependency of neighbors' values on enforcement and compliance with regulations. *See* Complaint ¶¶ 8, 9, 13, 18, RA 27-28, 29, 30:

> [T]he town has continued to issue building permits to other abutters along the pc l causing more sewerage to be dumped into the pond which increases the damage to Palazzolo's said land.
>
> . . . .
>
> The Defendants, by their refusal to correct or to allow the Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property and have taken the same without paying just compensation therefor.

Respectfully submitted.

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No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *ex rel.*
PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

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General Laws of 1938
TITLE XIV.

CHAPTER 112.

§ 1. Within the department of public works there shall be a division of harbors and rivers, and the director of public works shall appoint a chief of such division, who shall enforce the provisions of this chapter.

* * *

§ 8. The chief of the division of harbors and rivers may mark out harbor-lines suitable to be established in any of the public tide-waters of the state, where such harbor-lines have not already been established, and after the same shall have been platted may report the same to the governor and senate for their approval; and when such harbor-lines shall have been approved by the governor and senate or as the same shall be modified and approved thereby, the same shall be confirmed and established; but before any harbor-line shall be marked out or platted by the chief of the division of harbors and rivers, he shall appoint a time and place for hearing all persons interested therein, and shall give notice of such hearing by publishing the same for at least 30 days in the newspaper which he may determine will probably give the most publicity of such notice among the persons most likely to be interested therein, and at the time and place appointed, or at such adjournment of such hearing as said chief of the division shall make, he shall hear all persons interested for or against the establishment of such harbor-line, who may appear to be heard therein

before the said division shall proceed to mark out the same.

§ 9. The chief of the division of harbors and rivers shall have the general care and supervision of all the public harbors and tide-waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein, and may cause such harbors and public waters to be surveyed and platted and may make such examinations and observations as he may deem necessary to protect and develop the rights and interests of the state in such harbors and public waters; and may employ such engineers and other service as may be necessary to this end.

§ 10. The chief of the division of harbors and rivers shall regulate the depositing of mud, dirt and other substances in the public tide-waters of the state, and shall prescribe the places where the same may be deposited; and every person who shall place or deposit mud, dirt or other substances in said waters without obtaining proper authority therefor, shall be fined for each offense $100.00, one-half thereof to the use of the state and one-half thereof to the use of the complainant.

§ 11. All persons who shall build into or over public tide-waters, by authority of said division, or by authority of the general assembly, any wharf, pier, bridge or other structure, or drive any piles into the land under public tide-water, or fill any flats, shall, before beginning such work, give written notice to the division of harbors and rivers of the work they intend to do, and submit plans of any proposed wharf or other structure and of the flats to be filled, and of the mode in which the work is to be

performed; and no such work shall be commenced until the plan and mode of performing the same shall be approved in writing by the chief of said division; and said chief may alter the said plans at his discretion and may prescribe the direction, limits and mode of building the wharves or other structures: *Provided*, that nothing herein contained shall be construed to impair the rights of any riparian proprietors to erect wharves authorized to be erected under any of the laws establishing harbor-lines within the state or otherwise by the general assembly.

* * *

§ 13. Every erection made into or encroachment upon the public tide-waters of the state, not authorized by the general assembly or by the division of harbors and rivers, shall be deemed to be a public nuisance and shall be prosecuted as such by the attorney-general.

* * *

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, Sc. Civil Action, File Number ___

ANTHONY PALAZZOLO
vs.
FREDERICK C. LEES, in his capacity as Director of the Department of Natural Resources of the State of Rhode Island

COMPLAINT
66-3490

1. Plaintiff, a resident of the Town of Westerly, County of Washington, brings this action pursuant to the provisions of Chapter 42-35 of the General Laws of Rhode Island, 1956, as amended, especially Section 15 thereof against defendant in his capacity under the provisions of Chapter 42-17.1 of General Laws of Rhode Island, 1956, as amended.

2. On April 29, 1966, the plaintiff filed with the Division of Harbors and Rivers (statutory representative of defendant for relevant purposes) an application to grade the beach in front of property owned by him on Winnapaug Pond in the Town of Westerly, which said application is attached hereto as Exhibit A and by this reference is incorporated herein.

3. On July 20, 1966, defendant, by letter to the plaintiff, denied the application alleged in paragraph two hereof upon the purported authority of Chapter 140 of

the Public Laws of Rhode Island 1965, which said decision of defendant is attached hereto as Exhibit B and by this reference is incorporated herein.

4. The application filed by plaintiff as alleged in paragraph two hereof, upon a printed form supplied by an agent of defendant, was purportedly required by the provisions of Section 46-6-1 of the General Laws of Rhode Island 1956, as amended, which said statutory section merely confers certain regulatory authority and does not authorize denial by defendant of the permission requested by the plaintiff.

5. Chapter 140 of the Public Laws of Rhode Island 1965 (Rhode Island General Laws, 1956, as amended, Section 2-1-13, etseq.) upon which the decision of defendant alleged in paragraph three hereof was based does not authorize the denial of plaintiff's application as determined by defendant and, in any event, the provisions thereof have not been complied with by defendant so that the statutory conditions precedent for the operation of said statute have not been fulfilled.

6. Under the provisions of Chapter 26 of the Public Laws of Rhode Island, 1965 (R.I. General Laws, 1956, as amended, Section 11-46.1-1), it is a criminal act to excavate in or to disturb "intertidal salt marshes", as defined in said statute, without first having obtained permission from defendant (statutory successor to the Director of Public Works under the provisions of chapter 42-17.1 of the General Laws of Rhode Island, 1956, as amended by Chapter 137 of Rhode Island Public Laws, 1965). Said statute contains no standards for the denial by defendant of an application for said permit and unless defendant is

required to issue said permit, said statute would be unconstitutional under the state and federal constitutions as applied to plaintiff in that the same would constitute an invalid exercise of the police power and a denial of due process of law.

7. As a riparian owner on the aforesaid Winnapaug Pond, plaintiff possesses property rights therein which the aforesaid action of defendant purportedly based as aforesaid on statutory authority seeks to infringe without payment of compensation in violation of plaintiff's constitutional rights.

8. For the reasons stated, the aforesaid decision of defendant in refusing to grant a permit to the plaintiff as requested was in excess of constitutional and statutory authority, and erroneous as a matter of law.

WHEREFORE, plaintiff demands (1) that the aforesaid decision of defendant be reversed, (2) that plaintiff have relief by way of mandamus pursuant to Rule 81(d) directing defendant to grant the permit requested, and (3) that plaintiff have such other and further relief in the premises as this Court may deem just.

ANTHONY PALAZZOLO
By his attorneys,

Roberts & McMahon
/s/ William McMahon
Roberts & McMahon
405 Industrial Bank Building
Providence, Rhode Island 01903

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, Sc. Civil Action, File No. 66-3490

ANTHONY PALAZZOLO
vs.
FREDERICK C. LEES, in his capacity as Director of the Department of Natural Resources of the State of Rhode Island

ORDER

(Filed Dec. 30, 1966)

The above matter came on for hearing upon the plaintiff's appeal under the provisions of Chapter 42-35 of the General Laws of Rhode Island, as amended, and following arguments of counsel and upon consideration thereof it appearing that the administrative record herein is sufficient for the purposes of judicial review as provided for in Section 42-35-15 of the General Laws of Rhode Island as amended, it is hereby ordered.

Pursuant to the provisions of said Section 42-35-15 of the General Laws of Rhode Island, as amended, the within case is hereby remanded to the Department of Natural Resources of the State of Rhode Island for hearing and finding of fact and without prejudice to the plaintiff's right to amend his application which is set forth in the complaint.

Entered as the Order of this Court this 30th day of December A.D. 1966.

By order
/s/ [Illegible]

ENTER:

[Illegible] J.
Dated: 12/30/66

The State of Rhode Island
Coastal Resources Management Program

As Amended June 28, 1983

The Program's Enabling Legislation (1971) as Amended

Chapter 23 of the General Laws of Rhode Island
Coastal Resources Management Council

46-23-1. Legislative Findings. Creation. The general assembly recognizes and declares that the coastal resources of Rhode Island, a rich variety of natural, commercial, industrial, recreational, and aesthetic assets are of immediate and potential value to the present and future development of this state; that unplanned or poorly planned development of this basic natural environment has already damaged or destroyed, or has the potential of damaging or destroying, the state's coastal resources, and has restricted the most efficient and beneficial utilization of such resources; that it shall be the policy of this state to preserve, protect, develop, and where possible, restored the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long-range planning and management designed to produce the maximum benefit for society from such coastal resources; and that preservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alternation of coastal resources will be measured, judged, and regulated.

That effective implementation of these policies is essential to the social and economic well-being of the people of Rhode Island because the sea and its adjacent lands are major sources of food and public recreation,

because these resources are used by and for industry, transportation, waste disposal, and other purposes, and because the demands made on these resources are increasing in number, magnitude, and complexity; and that these policies are necessary to protect the public health, safety, and general welfare. Furthermore, that implementation of these policies is necessary in order to secure the rights of the people of Rhode Island to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and in order to allow the general assembly to fulfill its duty to provide for the conservation of the air, land, water, plant, animal, mineral, and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration, and restoration of the natural environment of the state.

That these policies can best be achieved through the creation of a coastal resources management council as the principal mechanism for management of the state's coastal resources.

* * *

46-23-6. POWERS AND DUTIES. In order to properly manage coastal resources the council shall have the following powers and duties:

* * *

The council is authorized to formulate policies and plans and to adopt regulations necessary to implement its various management programs.

Any person, firm, or governmental agency proposing any development or operation within, above, or beneath the tidal water below the mean high water mark, extending out to the extent of the state's jurisdiction in the territorial sea shall be required to demonstrate that its proposal would not (1) conflict with any resources management plan or program; (2) make any area unsuitable for any uses or activities to which it is allocated by a resources management plan or program; or (3) significantly damage the environment of the coastal region. The council shall be authorized to approve, modify, set conditions for, or reject any such proposal.

* * *

Regulations

Section 100. Alternations and Activities That Require an Assent from the Coastal Resources Management Council

100.1. Tidal Waters, Shoreline Features, and Contiguous Areas

A. A Council Assent is required for all alterations and activities listed in Table 1 that are proposed for (1) tidal waters within the territorial sea (including coastal pounds, some of which are not tidal but which are coastal waters associated with a barrier beach system); (2) shoreline features; and (3) areas contiguous to shoreline features.

* * *

D. Shoreline features together encompass the entire shore and are assigned to the following categories:

(1) Coastal beaches and dunes;

(2) barrier beaches;

(3) coastal wetlands;

(4) coastal cliffs, bluffs, and banks;

(5) rocky shores; and

(6) manmade shorelines.

* * *

Section 120. Variances

A. Applicants desiring a variance from a standard shall be granted an Assent only if the Council finds that the following five criteria are met:

(1) The proposed alteration conforms with applicable goals and policies in Parts Two and Three.

(2) The proposed alteration will not result in significant adverse environmental impacts or use conflicts.

(3) Due to conditions at the site in question, the standard will cause the applicant an undue hardship.

(4) The modification requested by the applicant is the minimum necessary to relieve an undue hardship.

(5) The undue hardship is not the result of any prior action of the applicant.

B. Relief from a standard does not remove the applicant's responsibility to comply with all other Program requirements.

Section 130. Special Exceptions

A. Special exceptions may be granted to prohibited activities to permit alterations and activities that do not conform with a Council goal for the areas affected or which would otherwise be prohibited by the requirements of this document only if and when the applicant has demonstrated that:

(1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.

(2) All reasonable steps shall be taken to minimize environmental impacts and/or use conflict.

(3) There is no reasonable alternative means of, or location for, serving the compelling public purpose cited.

* * *

Section 200
Tidal and Coastal Pond Waters

A. Introductory Findings

1. Rhode Islanders have a deep commitment to their coastal environment. Their concern for Narragansett Bay and the South Shore coastal ponds has been voiced in numerous ways, including support of landmark legislation in 1971 that created the Coastal Resources Management Council, endorsement of many of the efforts of environmental organizations such as Save the Bay and the Audubon Society of Rhode Island, and passage of the largest bond issue in the state's history in order to relieve chronic pollution in upper Narragansett Bay caused by the antiquated Providence municipal sewage treatment plant. The concerns of the public have in large measure been responsible for decisions not to build oil refineries in Jamestown and Tiverton, and to halt the indiscriminate destruction of salt marshes and the improper disposal of dredged spoils, Narragansett Bay is widely accepted as the state's greatest resource, and our coastal waters and shoreline are the focus not only of tourism but of efforts to attract new businesses into the state. Rhode Island strives to maintain the image of a desirable place to work and raise a family, and these attributes are inextricably bound to a varied and beautiful shoreline, where water quality and, no less important, visual quality are excellent and well protected. The qualities that make Rhode Island's coast beautiful and an unparalleled recreational resource are fully as important as the more readily quantifiable commercial and industrial water-dependent activities. The designation of large stretches of waters or coastline for conservation and low-intensity use by this

Program recognizes these facts and will help maintain a high quality of coastal environment for future generations of Rhode Islanders.

* * *

200.2.
Type 2 Low-Intensity Use

A. Definition

This category includes waters in areas with high scenic value that support low-intensity recreational and residential uses. These waters include seasonal mooring areas where good water quality and fish and wildlife habitat are maintained.

B. Findings

* * *

2. Major portions of the salt ponds along the South Shore between Watch Hill and Point Judith are assigned to Type 2 waters. Nearly all have retained their scenic and natural characteristics while accommodating residential docks, minor dredged channels, and small-scale shoreline protection structures. Each coastal pond is an individually distinct ecosystem and a unique feature of great scenic value. Continuing residential development within the watersheds of the salt ponds poses severe threats to future water quality in the form of both bacterial contamination and eutrophication.

* * *

5. Since runoff can be a major source of pollutants from developed areas to poorly flushed estuaries, new or

enlarged discharges shall be permitted in to the following Type 2 waters only when it is demonstrated that no reasonable alternative exists and that no significant adverse impact to the receiving waters will result:

(a) Winnapaug Pond

* * *

Table 4. Undeveloped, Moderately Developed, and Developed Barrier Beaches.

* * *

Developed

Atlantic Beach, Westerly

* * *

210.2
Barrier Beaches

* * *

Barrier beaches are narrow strips of land made of unconsolidated material, usually extending parallel to the coast and separated from the mainland by a coastal pond, tidal water body, or coastal wetland.

* * *

Developed barrier beaches contain houses and/or commercial/industrial structures; they may also contain surfaced roads and structural shoreline protection facilities.

* * *

1. Rhode Island's South Shore coastal ponds and a frequently low-lying mainland are protected from the forces of the open ocean by a chain of low, narrow barrier beaches.

* * *

2. On barrier beaches classified as developed in Table 4, the Council's goal is to ensure that the risks of storm damage and erosion for the people inhabiting these features are minimized, that activities that may reduce the effectiveness of the barrier as a storm buffer are avoided, and that associated wetlands and ponds are protected.

* * *

210.3
Coastal Wetlands

A. Definition

Coastal wetlands include salt marshes and freshwater or brackish wetlands contiguous to salt marshes. Areas of open water within coastal wetlands are considered a part of the wetland.

Salt marshes are areas regularly inundated by salt water through either natural or artificial water courses and where one or more of the following species predominate: smooth cordgrass (*Spartina alterniflora*), salt meadow grass (*Spartina patens*), spike grass (*Distichlis spicata*), black rush (*Juncus gerardi*), saltworts (*Salicornia* spp.). sea lavender (Limonium carolinianum), salt – marsh bulrush (*Scirpus* spp.). high tide bush (*Iva frutescens*).

Contiguous and associated freshwater or brackish marshes are those where one or more of the following species predominate: tall reed (*Phragmites communis*), tall cordgrass (*Spartina pectinata*), broadleaf cattail (*Typha latifolia*), narrowleaf cattail (*typha angustifolia*), spike rush (*Eleocharts rostellala*), chairmaker's rush (*Scirpus americana*), creeping bentgrass (*Agrostis palustris*), sweet grass (*Hierochloe odorata*), wild rye (*Elymus virginicus*).

B. Findings

1. Coastal wetlands are important for a variety of reasons. They provide food and shelter for large populations of juvenile fish and are nurseries for several species of fish. The mud flats and creeks associated with many coastal wetlands are rich in shellfish, particularly soft-shelled clams. Coastal wetlands also provide important habitat for shorebirds and waterfowl, and many are among the most scenic features of the Rhode Island shore. Coastal wetlands are effective in slowing erosion along protected shores.

* * *

C. Policies

* * *

4. Alterations to salt marshes and contiguous freshwater or brackish marshes abutting Type 2 waters are prohibited except for minor disturbances associated with (a) residential docks and walkways approved pursuant to the standards set forth in Section 300.3, and (b) approved

construction or repair of structural shoreline protection facilities.

* * *

Section 300.
In Tidal and Coastal Pond Waters, on Shoreline Features and Their Contiguous Areas

* * *

B. Prohibitions

1. Filling, removing, or grading is prohibited on beaches, dunes, undeveloped barrier beaches, coastal wetlands, cliffs and banks, and rocky shores adjacent to Type 1 and 2 waters unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms.

2. Filling, removing, or grading on coastal wetlands is prohibited adjacent to Type 1 and 2 waters, and in coastal wetlands designated for preservation adjacent to Type 3, 4, 5, and 6 waters, unless a consequence of an approved mosquito-control ditching project (Section 300.12).

* * *

B. Prerequisites

1. Applicants for residential structures shall obtain, as necessary, a local building permit or a letter from the building inspector stating that all local requirements will be met and a permit will be issued.

2. Applicants proposing to build an individual sewage disposal system (ISDS) shall obtain a permit from the Department of Environmental Management.

* * *

4. Applicants shall demonstrate that connections to public water supply and sewer systems shall be provided where on-site water withdrawal and/or sewage disposal will have a significant environmental or public health impact.

* * *

300.6.
Sewage Treatment and Disposal

A. Definitions

* * *

2. Individual sewage disposal system (ISDS): any arrangement for sanitary sewage disposal by means other than discharge into a public sewer system.

* * *

C. Prerequisites

1. Applicants for Council Assents to construct, alter, or extend individual sewage disposal systems or point source discharges shall first obtain a permit from the Department of Environmental Management.

* * *

300.10.
Filling in Tidal Waters

* * *

B. Policies

1. It is the Council's policy to discourage and minimize the filling of coastal waters.

2. In considering the merits of any given proposal to fill tidal waters, the Council shall weigh the public benefit to be served by the proposal against the loss or degradation of the affected public resource(s).

C. Prerequisites

1. A water quality certification from the Department of Environmental Management shall be required.

2. Filling of tidal waters requires an Assent from the Army Corps of Engineers.

D. Prohibitions

1. Filling in Type 1 and 2 waters is prohibited unless the primary purpose of the project is to preserve or enhance the area as a conservation area and/or a natural buffer against storms.

* * *

Glossary

* * *

Coastal pond. A coastal lagoon usually located behind a barrier beach which in its natural condition, permanently or occasionally exchanges waters with the ocean.

* * *

COASTAL RESOURCES MANAGEMENT COUNCIL

MANAGEMENT PROCEDURES

* * *

4.2 Information requirements, application forms and fees:

[1] Application forms may be obtained from the Coastal Resources Management Council. Oliver Stedman Government Center, Tower Hill Road, Wakefield, R.I. 02879 or by calling 277-2476.

[2] An application checklist/instruction sheet will be forwarded to each applicant together with required forms.

[3] Applicants must complete four [4] forms and return them together with a $50.00 processing fee to the Coastal Resources Management Council.

[4] Applicants shall be required to obtain and certify that they have in their possession current approvals from municipal bodies which are otherwise required for the proposed action. Municipal approval shall be construed to mean compliance and conformity with all applicable comprehensive plans and zoning ordinances and/or the necessary variance, exception and other special relief therefrom.

Applicants shall further be required to obtain and certify that they have in their possession current approvals from all other agencies which are otherwise required for the proposed action.

The above required municipal and state approvals shall be construed as a prerequisite for any application before the Council considers

the application. The Council may waive the requirements of obtaining approvals in the usual sequence by a majority vote of the Council. But a final assent shall not issue until all required approvals have been obtained.

In contested cases, the Subcommittee shall not proceed until it has received the comments from staff biologist, staff engineer. Historical Preservation Commission, Statewide Planning and water quality certification comment.

* * *

COASTAL RESOURCES MANAGEMENT COUNCIL

RE: ANTHONY PALAZZOLO
File No: 83-3-55

THURSDAY, AUGUST 18, 1983
WESTERLY TOWN HALL
WESTERLY, RHODE ISLAND
7:30 p.m.

COUNCIL MEMBERS PRESENT

JOSEPH F. TURCO, CHAIRMAN
BARBARA B. COLT and
DONALD C. BROWN and
JOHN D. BIAFORE, ESQUIRE

APPEARANCES

ANTHONY PALAZZOLO, PRO SE

HAROLD B. SOLOVEITZIK, ESQUIRE. . . . FOR THE OBJECTORS

Anthony Palazzolo

* * *

[22] Q All right. Have you ever had a perk test made of this property?

A No.

Q Do you know whether or not it would pass a perk test?

A It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that.

* * *

STATE OF RHODE ISLAND
Washington, S.C.

SUPERIOR COURT

ANTHONY PALAZZOLO,
Individually and as successor in title to Shore Gardens, Inc.

VS.

COASTAL RESOURCES MANAGEMENT COUNCIL of the State of Rhode Island, ROBERT R. BENDICK in his capacity as Director of the Rhode Island Department of Environmental Management, formerly the Department of Natural Resources, and JOSEPH PELLEGRINO as Town Treasurer of the Town of Westerly

C.A. No.
WM 88-297

COMPLAINT FOR ASSESSMENT OF DAMAGES

I. PARTIES

1. Plaintiff is the owner of certain real estate in the Town of Westerly located between Atlantic Avenue and Winnipaug Pond consisting of 74 platted lots, being described on the Westerly Tax Assessor's map as Plat 155 Lots 68 through 129 and 132 through 143 inclusive. Said land stands of record in the name of Shore Gardens, Inc. Shore Gardens, Inc. was a Rhode Island corporation whose charter was forfeited by the Secretary of State and whose sole stockholder, officer and director was the Plaintiff. Shore Gardens, Inc. had no creditors at the time of its Charter forfeiture and by virtue of the doctrine set forth in the Rhode Island case of *DiPrete vs. Vallone*, 72 RI 137 48 A. 2d 250, the Plaintiff is the the [sic] successor in

interest to Shore Gardens, Inc. and is the sole owner of the real estate in question.

2. Defendant Coastal Resources Management Council is an agency of the State of Rhode Island created under and by virtue of the Public Laws of 1971, Chapter 279, as amended by Chapter 212 of the Public Laws of 1985 and now codified as Chapter 46-23 of the General Laws.

3. Defendant Robert R. Bendict is the Director of the Department of Environmental Management of the State of Rhode Island which is here being sued by virtue of its duties under the provisions of Chapter 2-1 of the General Laws and their application to the Plaintiff's real estate. Said Department formerly was the Department of Natural Resourses [sic] of the State of Rhode Island.

4. The Defendant Town of Westerly is a municipal corporation in the State of Rhode Island capable of being sued by and through its Town Treasurer, Joseph Pellegrino, under and by virtue of the provisions of Section 45-15-1 of the General Laws. Plaintiff has filed many claims with the Town Council of the Town of Westerly for the damages here being sought under the provisions of Section 45-15-5 of the General Laws and each time has been refused or no action has been taken thereon.

II. JURISDICTIONAL STATEMENT

5. This action is brought as a petition for assessment [sic] of damages to recover just compensation for the inverse condemnation of Plaintiff's said real estate. This action is grounded in and brought under and by virtue of the provisions of the "Just Compensation" clause of the

Fifth Amendment to the Constitution of the United States as made applicable to the States by virtue of the "Due Process" clause of Section I of the Fourteenth Amendment to the Constitution of the United States, and also under and by virtue of the provisions of Section 16 of Article I of the Constitution of Rhode Island of 1843 and as amended by the Constitution of Rhode Island adopted December 4, 1986.

III. CAUSE OF ACTION

6. The Plaintiff acquired his said real estate in 1961 by his acquisition of 100% of the stock of Shore Gardens, Inc. Shore Gardens, Inc. acquired said real estate in 1959 and said property had been platted and zoned residential for 74 lots since 1936.

7. The Plaintiff's said property borders on Winnipaug Pond also known as Brightman's Pond in the Misquamicut section of Westerly.

8. The Town of Westerly by virtue of its failure to properly regulate the dumping and discharge of sewerage into Winnipaug Pond has caused the natural drainage of Winnipaug Pond to become impeded which in turn has caused the Plaintiff's land to become eroded and flooded and caused what had been Plaintiff's Pond frontage and buildable land to be turned into a natural cesspool which is marshy and unbuildable.

9. Plaintiff has on many occasions requested the Defendant Town to prevent the discharge of sewerage and the dumping of materials into the pond which was

causing the damming of the pond in front of the Plaintiff's said property, thus causing Plaintiff's said property to become flooded and eroded, but the Town has failed and refused to do anything about the problem. In fact, the town has continued to issue building permits to other abutters along the pond causing more sewerage to be dumped into the pond which increases the damage to Plaintiff's said land.

10. On March 29, 1962 the Plaintiff made application to the Division of Harbors and Rivers of the Rhode Island Department of Natural Resources (Now the Department of Environmental Management) for permission to dredge the pond, build bulkheads and deposit the silt on his land to restore the natural drainage to the pond. This application was held without action by the Department although the Division of Fish and Game of the Department of Natural Resources was in favor of the application.

11. On May 16, 1963 the Plaintiff further revised his application. This also was held without action by the Department. On April 29, 1966 the application was further modified to maintain a beach along the pond.

12. On, to wit, July 20, 1966 the Department of Natural Resources issued its decision denying Plaintiff's application. Plaintiff then appealed to the Superior Court which remanded the matter back to the Department for further hearings. Finally, on April 1, 1971 the Department approved Plaintiff's application. However, on April 18, 1971 this approval was revoked without cause or reason by the Department.

13. From 1971 to 1983 the Plaintiff continued in his attempt to get the Town to either put in sewers or prevent the dumping of sewerage into the pond, all to no avail.

14. On, to wit, April 4, 1983 Plaintiff, representing himself, made a new application to the Coastal Resources Management Council for permisssion [sic] to erect a bulkhead along the pond and fill his land. This application was denied.

15. On, to wit, January 21, 1985 Plaintiff made another application to the Coastal Resources Management Council, this time for an exception to fill in a portion of his land which had been eroded in order to make a beach club on it. There was no request that the Plaintiff be allowed to build residences on his land as he has the right to do. This application was also denied.

16. The Plaintiff purchased his said land for residential use and has been paying taxes to the Town of Westerly on 74 residential lots from the time of purchase until the present time. The Plaintiff had been trying for the past 27 years to use his land for residential or recreational purposes but has been prevented from doing so by reason of the supposed "regulations", actions and inactions of the Defendants.

17. After stalling his initial application for nine years, the Department of Natural Resources granted and then revoked its assert to Plaintiff's dredging the pond. During this nine year period the situation had worsened, there was more erosion and flooding of his land and more impeding of the drainage of the pond thus creating a larger marsh and a smaller pond.

18. The Defendants, by their refusal to correct or to allow the Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property and have taken the same without paying just compensation therefor.

Wherefore Plaintiff prays that this Honorable Court assess Plaintiff's damages and award to Plaintiff just compensation for the taking of his said property and depriving him of all beneficial use thereof from 1961 to the present and award him such other and further relief as to this Court shall seem meet and just.

By his attorneys,
DiSandro-Smith & Associates,
P.C., Inc.

/s/ Z. Hershel Smith
Z. Hershel Smith
Suite 402 The Packet Building
155 South Main Street
Providence, RI 02903
(401) 274-7900

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, Sc.		SUPERIOR COURT
ANTHONY PALAZZOLO	)	
	)	
vs.	)	WC/88-0297
STATE OF RHODE	)	
ISLAND AND COASTAL	)	
RESOURCES	)	
MANAGEMENT	)	
COUNCIL	)	

HEARD BEFORE MR. JUSTICE FRANK J. WILLIAMS

ON JUNE 18 & 19, 1997

NON-JURY TRIAL-VOLUME 1 OF 4

Grover John Fugate

* * *

[170] A The application in 1983 involves an extensive amount of fill because it indicates that the elevation is going to be brought up to the six foot – six and a half foot mark. The '85 application indicates again that there is going to be a substantial amount of fill wetlands, but there is no elevational point.

* * *

[171] A Substantially in terms of the impact to the area, it would be the same, provided the extent was the same.

Q Let me ask you about the location of the fill on the area in question. With respect to the second application, the beach club application, would the fill have been

confined towards the Atlantic Avenue, or that is to say, southern end of the property?

A No. The fill was proposed to be towards the pond's edge.

Q Okay.

A It was obvious that the beach club wanted to locate on the pond, and therefore the major portion of that fill was to be located towards the northern end of the site.

Q Were these plans adequate for the Coastal Council's purposes? And, if not, in what respects not?

A For an application at that time for a beach club facility, again, it would have invoked a series of [172] sections under the plan, many of them very similar to the '83 application. For instance, there was the variance sections because there were obviously variances that would be required, so they would have to address the various burdens of proof under 120 because of the filling of the coastal wetlands and the filling of – and work within the tidal water area that probably would have required – I know it would have required a special exception. So those burdens would have to have been addressed. Section 140, Section 150, the buffer variances again, 200.2, which is the Type II waters, policies concerns would have to be addressed. 210.2, which is –

Q Is that 210.2?

A 210.2, which is the aerial section; 210.3, which is the coastal wetland section; and 300.1, 300.2, which is filling and grading on a coastal feature; 300.3 for commercial activity. And again, because there were – commercial

activity was invoked, we would need local approvals for all that to assume that was properly zoned and that met all the local building standards, fire hazard codes, all that.

Also, ISDS usually requires a permit for the placement of port-a-johns in these areas, and they usually require a maintenance plan and mitigation plan [173] because this is a velocity zone under the National Flood Insurance Program under FEMA.

This is a flood hazard zone with a base flood elevation of approximately fifteen feet which means that those outhouses in a storm surge would end up in the pond or on somebody's property on the backside, so it would require a mitigation plan for removal of those structures in the event of a storm or those types of things.

They would also require, if there is a drainage area here, it's unclear whether there are outfalls or anything else from this. But if there were, they were required to address the burdens under 300.6. And because they are invoking work below the tidal water and filling up below the tidal water, it would invoke the 310 provision, which again invokes the prerequisites of an Army Corps permit under Section 10, 404, and then the State water quality certification under 401, and also 330.

Because this plan came in after the adoption of the sand plan, which is the special management plan for the state of that region there which I developed for already degraded areas where we are trying to restore water quality, it would also have to address the burdens under the sand plan, and that was adopted at that time.

* * *

[175] A There is upland portions to the site, and there was at the time of the application based on aerial photo analysis.

Q What do you mean by upland?

A That portion of area above the mean high water mark is usually substantially dry, except for extreme coastal storms.

Q Now, I'm familiar with zoning practice, and I know the terms of variance and special exception with respect to zoning practice. Do those two words have the same meaning?

A I think they are probably reverse.

Q At the Coastal Council they are reversed?

A I think in terms of the burdens, a special exception is a tougher burden to meet than a variance.

Q At the Coastal Council?

A At the Coastal Council.

Q But in general zoning practice, it's the opposite?

A I believe so.

Q Okay. With respect to the development of the upland portions of the parcel, or the area in question in this [176] case, which of those standards would have applied in 1983 with respect to the plaintiff?

A For the upland portions, it's a variance.

Q And how about in 1985?

A Again, in 1985 the plan did not change. It would have been a variance.

Q It would be a variance today as a matter of fact, right?

A That's correct.

Q Did Mr. Palazzolo ever submit a plan that was restricted to the upland portions of the property of the area?

A There was no record of such a plan.

Q Ever?

A Ever.

Q Do the upland portions of the area in question in this case contain or comprise sufficient square footage such that one could fit the footprint of a house?

A Provided that a septic system of suitable design, yes, I think you could probably fit a residential structure on that site.

Q But that was never applied for?

A No.

Q Oh, I've heard a lot about the need for a public purpose or a compelling public purpose from Mr. Webster. To what extent does that standard apply to a variance?

A It doesn't apply to a variance. It applies to a special [177] exception.

* * *

[187] A Between '88 and '92, the development patterns on the Atlantic Avenue portion of that barrier for the northern side of Atlantic Avenue are confined pretty well exclusively to the upland portion or the dry land portion that immediately abuts the northern side of Atlantic Avenue.

* * *

[188] A The area in 1986, again, the development that has occurred in that area, except for two remnant structures or several remnant structures that predated to Council, has been all along the dry land area immediately abutting Atlantic Avenue on the north side.

* * *

[190] Q With respect to your testimony that there is an upland area on the location in question in this case, which if an ISDS system were technologically feasible would be permitted by the Council today under variance, is the existence of such an area borne out by the '92 photograph?

A Yes.

Q And is the existence – that's all right, you don't have to point it out.

A I was going to say why the upper upland portions that we are aware of exists at the road that abuts the pond. There may, and again, because we don't have an accurate or detailed survey, there may be other upland portions that are immediately adjacent to Atlantic Avenue, but that can't be determined.

Q Immediately adjacent, or immediately adjacent to the lots which are immediately adjacent?

A Well, immediately adjacent to the lots.

Q That are in turn immediately adjacent to the Atlantic –?

[191] A Right where on the lots that are immediately adjacent to Atlantic Avenue.

Q And is the existence of such an area borne out by the 1988 photograph?

A Yes.

Q Okay. And is the existence of such an area borne out by your actual visits to the site this year?

A Yes.

* * *

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, Sc. SUPERIOR COURT

ANTHONY PALAZZOLO	)	
	)	
VS.	)	WC/88-0297
STATE OF RHODE ISLAND	)	
AND COASTAL RESOURCES	)	
MANAGEMENT COUNCIL	)	

HEARD BEFORE MR. JUSTICE FRANK J. WILLIAMS

ON JUNE 20 & 23, 1997

NON-JURY TRIAL – VOLUME 2 OF 4

Grover John Fugate

[199] Q Okay. Now, yesterday you indicated that there was some upland on my client's property.

A There is – let me put this way, there has never been a proper survey submitted in any of these applications. Judging from the documents that we have in trying to estimate the area, it appears that there is upland in those – there is a small portion of upland.

Q All right. Would it be fair to say that that small portion of upland is further south towards Atlantic Avenue as opposed to further north towards the pond?

A The upland that I am thinking of is a small area at the turnaround at the terminus of Shore Gardens Road which is at the northern end of the site.

Q Where the car turnaround is on the plans?

A Yes.

Q That's the only upland?

A The back shore, again, because I am not sure where the [200] back property line is, I can't determine whether there is upland present there or not.

* * *

[210] Q So we can put a house on where it appears to be lot number twenty?

A Or somewhere around there. There are –

Q Twenty or nineteen?

A Somewhere in this area here. It's difficult to pin down. There may also be, if I can just look at this, there may be some upland area on the backside of 80 through 75.

Q So you are saying it's theoretically possible we can put one house on Lot 20, and, depending upon where the coastal feature goes, perhaps a house up in the area of Lot 80 or 79?

A Or one – or I don't know how many.

* * *

[211] Q All right. Well, for the purposes of this discussion I'd like you to assume that those are the only two permitted uses under the Westerly zoning ordinance. Now, you've indicated that there is a potential that we can build on two, perhaps three, perhaps four of the lots; correct?

A Perhaps.

Q Perhaps. So we have 76 lots – 74 lots here. What about the other 70? What uses can my client put his property? What can he do with that property? What productive use can he have?

* * *

[212] Q No. I want to know in your opinion, you are the executive director, is there any set of circumstances that you can think of where my client would be able to go in and get approval to put 69 residential homes on [213] that property?

A 69?

Q Correct. I'm assuming that he will be able to use five pursuant to our previous discussion.

A No, I don't think the Council would approve 69

Q And the reason for that is because to do a residential home, you need to put fill in there?

A Correct.

Q Now, you indicated to the Court yesterday, Grover, that my client, that there was no evidence that a subdivision was going to be there, right?

A There was no request for a subdivision.

Q Well, you didn't need a request. We had a subdivision; we needed to put fill to put homes on it, right?

A Typically, when an application was coming in that time for residential development, they would ask to be able to build and construct X number of lots. They would have to put road systems in, they would have to put water lines in, they would have to put ISDS's. They all have to – they are applied for at that time.

The Council, at that time, consistently asked for the application to come in in one fashion. They resisted phased approach to development because the Council needed to get the whole picture in order to look at the project in its entirety to make a proper [214] assessment of whether the first stage was even proper.

Q But my client did tell you that he is applying to put fill into the property for the purposes of allowing a use under the zoning ordinance, did he not?

A He said whatever the zoning would allow.

Q That's right. And, as a matter of fact, page one of his application, handwritten, he states, it says: "Proposal to restore property line and protect and prevent further erosion, and to fill property to Elevation 6.5; to prepare property for uses as designated by zoning regulation." So he told you that; correct?

A All I can tell you, Mr. Webster, is under review of the record, when your client was cross-examined and asked whether he was going to put a residential development on it, he was extremely vague as to whether he was going to put any at all on it.

* * *

John P. Caito

* * *

[274] A. Once the muck is removed, I estimated a total depth of eight feet of fill would be required to properly stabilize the site for the construction of residential dwellings on foundations, as well as the installation of some type of on-site sewerage disposal system.

* * *

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

WASHINGTON, Sc. SUPERIOR COURT

ANTHONY PALAZZOLO	)	
	)	
VS.	)	WC/88-0297
STATE OF RHODE ISLAND	)	
AND COASTAL RESOURCES	)	
MANAGEMENT COUNCIL	)	

HEARD BEFORE MR. JUSTICE FRANK J. WILLIAMS

ON JUNE 25 & 26, 1997

NON-JURY TRIAL - VOLUME 4 OF 4

Steven M. Clarke

* * *

[610] A All that I can tell you is that based on my discussions with the two aforementioned gentlemen, that there - and my review of the site, the site has two uplands areas. One upland area is located at the end, at the end of Lots 127 and 128. You see Elevations 3, 3.3. That's upland.

There is also an island in the middle right down in this area on Lot 88 or a little bit farther west. There is also a freshwater wetland, not a coastal wetland, but freshwater wetland that is located in the area of behind Lot 68 to 70 to 71. In discussions with the two gentlemen, it seemed that a - that an ISDS system -

MR. WEBSTER: I'm going to object to the hearsay coming in with regard to Mr. Chateauneuf, not with

regard to Mr. Reis. Mr. Reis is an agent of a party opponent, and I'm not objecting to that. But any conversations with Mr. Chateauneuf, who is not a party opponent, I object to.

MR. RUBIN: I believe the witness phrased his answer, "as a result of the conversation with."

[611] THE COURT: And also zone review of the site. You may answer.

A And giving the changing times of different alternate ISDS systems, which are available today that might have not been available ten years ago, that an ISDS system should be able to be designed and approved in the area of Lots 127, 128, and a potential one or two ISDS systems should be able to be constructed behind 68 and 71 in that area.

The access to Lots 127, 128 is right down the gravel road. The access to Lots 68, 69, 70 is, once again, after these homes, the two homes that are built here, there would have to be a road extension and access gained into that area. All I can tell you is that Mr. Reis, when I talked to him the other day, when I explained the situation about a freshwater wetland and possibly it's not in the coastal feature, he thought that that might be a site that will be acceptable.

I have constructed on at least two occasions ISDS systems in a freshwater wetland when it abutted a coastal feature, and received approvals.

Q Now, you would require variances for that both with respect to ISDS and with respect to CRMC; isn't that correct?

A The 127, 128 is conceivable that what we'd be looking [612] for is an alternate type of design system that they have now. They have the new eco system. The new eco system allows you to downsize your leaching area, things along that line. With respect to behind 68 through 71, 72 area, yes, we would be looking for a variance. And the island that's out in the middle is just unreachable, nonaccessible.

Q Now, with respect to getting such a variance with respect to both locations, you would need a variance from ISDS; correct?

A That's correct. That's the reason I talked to Mr. Chateauneuf before I was going to take the stand.

Q All right. But you feel it would be realistic to expect such a variance?

A I felt that they were realistic to apply for those locations. I then discussed it with Mr. Chateauneuf, and he gave me supporting information saying that it made sense.

Q Do you believe it would be realistic to expect variances for a subdivision of the magnitude, the density, and the number of lots of the proposal that you came up with based on Mr. Caito's assumptions?

MR. WEBSTER: Objection, your Honor.

THE COURT: Read back the question.

(Question read)

[613] THE WITNESS: No, I don't believe so.

THE COURT: No, there is an objection. I have to rule on it. But I'll allow it. You have to answer it.

A I don't believe so. It's just – just way too aggressive of the development, and even that's based on Mr. Caito's 74 lots. And I scaled it back to 50 lots, which I thought could anyway be achievable to even go forward with, and that just seems way too many. Entire subdivision of variances.

MR. RUBIN: If I may confer for a moment.

(Pause)

Q Did you hear Mr. Caito testify at his deposition or read in his deposition testimony any testimony with respect to the use of alternative systems such as privies?

A Yes.

Q Okay. And, in fact, did you hear Mr. Webster elicit testimony with respect to such alternative systems on his cross-examination of Rush Chateauneuf?

A Yes, I did.

Q Okay. What is a privy?

A A privy, and I – I thought the day that I heard the question was a little bit – but a privy, I looked it up yesterday, is a latrine or outhouse. And it's kind of comical when you think about it, that that would be considered as an alternate here. Because if I've got [614] this straight, I'm going to build this house seven feet in the air. At about two in the morning I get up, I'll go down the stairs, walk out in back. The outhouse is another structure. I'll go up a ladder, and I'll go into the outhouse and

then walk back out. I just don't think it's that type of a system that would be acceptable to this area.

THE COURT: Especially in the middle of a hurricane.

* * *

Thomas S. Andolfo

* * *

[685] Q Going back to the multi lot residential single family subdivision model, how would the use of alternative unconventional systems, such as a privy, have affected market value?

A I can only say that in my opinion it would have a negative impact on value, just for the very fact of what a privy is and how you have to access it. In my opinion, no one is going to buy a lot for $150,000 if you have to, you know, climb out of your house and climb upstairs to an outhouse.

* * *

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NEDOD-P 23 November 1971

Mr. Anthony Palazzolo
275 High Street
Westerly, Rhode Island 02891

Dear Mr. Palazzolo:

This refers to your revised application of March 29, 1962, for a Federal permit to perform construction and dredging operations in Winnapaug Pond in Westerly, Rhode Island.

In response to public notices reissued September 14, 1971, we have received thirty-two letters, including two petitions containing about sixty-six signatures. All letters and petitions express objection to the proposed work. These objections are based on the contention that the work would have a detrimental impact on aesthetics, water quality and existing fish and wildlife resources in the Pond, and would increase vehicular and boat traffic in the area.

In addition to the above noted objections, we have received a letter from the Regional Coordinator, Northeast Region, United States Department of Interior relative to your proposal. A copy of this letter is inclosed [sic]. That agency has reviewed your application and has recommended that the permit be denied. A separate review of the proposed work was undertaken by our Environmental Resources Section. It is concluded that the information contained in this review supports the recommendation of the Department of Interior.

In view of this recommendation, his office will not grant a Federal permit unless you can refute the information and views of the Department of Interior.

I welcome any comments or questions you may have. However, I must advise you that unless I hear from you within 30 calendar days, I will assume that you do not wish to discuss the issues further in which case I will recommend that our application be finally denied.

It should be borne in mind that should you resolve all the objections including those of the Department of Interior, this office cannot consider granting the Federal permit until the proper State Assent has been obtained. In this connection, it is noted that the Rhode Island Department of Natural Resources has declared the State Assent issued to you on May 19, 1971, null and void.

Again, if you have any questions pertaining to this matter, please do not hesitate to call me.

Sincerely yours,

F.W. MOEHLE
Chief, Permits Branch
Operations Division

1 Incl
As Stated

CF: Raymond Surdut
Counsellor at Law
Providence, Rhode Island

Charles Replinger
R. I. Div. of Coastal Resources
83 Park St.
Providence, R.I.

Opers Div File-Permits

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

INTER-OFFICE MEMO

TO: James Beattie, Chief

DEPT: Division of Coastal Resources

DATE: August 24, 1983

FROM: John M. Cronan, Chief [illegible]

DEPT: Fish & Wildlife

SUBJECT: Anthony Palazzolo application
file number 83-3-55

The Division of Fish & Wildlife has reviewed the above application and frankly find it to be one of the most blatant proposals regarding the destruction of coastal wetlands that we have ever seen. Jim Parkhurst's field report concerning this application lists most of our concerns over this proposal. The proposed filling of the saltmarsh will have many negative effects on finfish, shellfish and wildlife and again the Division is unalterably opposed to this proposal.

[LOGO]

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL
60 Davis Street
Providence, R.I. 02908

RECOMMENDATION OF SUBCOMMITTEE

Petition of: **ANTHONY PALAZZOLO**
275 High Street
Westerly, R.I. 02891

Docket Number: **83-3-55**

Applicant, ANTHONY PALAZZOLO, applied to the Coastal Resources Management Council to construct and maintain a pile bulkhead and place fill below Mean High Water [MHW] on Lot Numbers 3 thru 14, 17 thru 22, and 75 thru 80, Plat 155, off Atlantic Avenue, Westerly, Rhode Island, with specifications filed by applicant in Notes, 1, 2, 3, 4, filed with the application.

A duly appointed Subcommittee held a public hearing pursuant to the Administrative Procedures Act on August 18, 1983, in the Town Hall, High Street, Westerly, Rhode Island. At that time, evidence was submitted by applicant and other interested parties. Further evidence was submitted by staff members of the Coastal Resources Management Council [CRMC] and by other State agencies, all of which was incorporated into the record. All evidence so submitted to the Council pursuant to this application whether it be by interested parties, the applicant, or the Council itself through its own staff members and other State agencies, has been made available and is available for all interested parties at the offices of the

Coastal Resources Management Council, 60 Davis Street, Providence, Rhode Island.

FINDINGS OF FACT:

1. The applicant proposes to construct a wooden bulkhead type structure approximately 340' long along a portion of the southern shoreline of Winnepaug Pond. The proposed bulkhead retainer consists of a single line of horizontal poles [unknown diameter] connected to vertical poles spaced 20' apart. The vertical poles shall be dug to -4' MLW. The top of the horizontal retainers will be at existing grade [approximately 2.5' MLW].

Also, the area behind the bulkhead, approximately 18 acres of salt marsh is proposed to be filled to an approximate elevation of 6.5' MLW (5' MHW). Existing elevations of the area range from 0'-5' MHW with marsh elevations of 0'-2' MHW. Proposed embankments along property lines are to be graded to approximately 1 vert: 1 horiz. slopes. The applicant proposed to establish a 50' "buffer" upland of the proposed bulkhead. This "buffer" will consist of a 30' level area and then slope upland, 1 vert: 5 horiz. to an elevation of approximately 5' MHW. A previously filled gravel road approximately 50' x 860' runs through the eastern portion of the property. Marsh existing on both sides of this road is to be filled. According to text submitted, "the final grade and contour, [of fill] may be altered slightly, to allow for surface water management."

2. An extensive coastal wetlands system exists on the property. A wide strip of wetlands [700' - 1000'] borders Atlantic Avenue on the south and the southern shore of

Winnapaug Pond to the north. Misquito ditches, in generally good condition, intermingle throughout the area and allow tidal waters to fluctuate more freely. Ponding in small pools also occurs throughout the wetlands. As well as being a natural wildlife habitat, the wetlands system acts as a buffer to flooding, absorbs runoff, and filters pollutants in runoff waters entering Winnapaug Pond.

A single dwelling exists near the shore to the west, on or adjacent to the applicant's property. A small island – like mound exists to the west with elevations of 2' - 5' MHW. A previously filled gravel road [elev. 1' - 2' MHW] runs from Atlantic Avenue and terminates in a small turn around at the shore of the pond. This turn around is the site of some local littering and dumping. A short and narrow pebble beach is just below the turn around area. No significant erosion was noted along the shoreline and the area is well vegetated. There is, however, shoaling along he southern shore of the pond which would make it difficult for boating in the near shore areas. Wave action on the pond is low.

The USDA "Soil Survey of Rhode Island" classifies the soils in this area as "Mk. Matunuck mucky peet," characterized by level, poorly drained soils in tidal marshes. Permeability is rapid to very rapid and water capacity is low. "The daily tidal flooding and a high salt content make this soil unsuitable for most uses except as habitat for saltwater tolerant wildlife." The soil survey also states that this material is unsuitable for sanitary facilities and construction materials such as road fill or fill in general.

3. Drawings submitted and on file at our office are vague and inadequate for a project of this size and nature. This fact was brought to applicant's attention prior to hearing and has not been addressed by applicant. As a result, the property lines are vague and not specific.

4. Applicant proposes to construct a 1340 foot pole barrier dug into shoreline embankment.

5. Proposal to fill property to elevation 6.5' MLW includes the filling of approximately 18 acres of salt marsh and tidal waters. Final grades and contours have not been determined.

6. Impacts from runoff, flooding and biological concerns have not been addressed by applicant.

7. The effect of 1340 feet of horizontal poles along the shoreline and through tidal waters and wetlands were not addressed by the applicant.

8. It is apparent from staff reports that the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond. Such impacts were not addressed by the applicant.

9. Applicant has not demonstrated by a fair preponderance of evidence that the proposed development as submitted will not:

a. Conflict with the Federal & State approved Rhode Island Coastal Resources Management Plan.

b. Make the area unsuitable for any uses or activities to which it is allocated by a CRMC Plan or Program.

c. Significantly damage the environment of the coastal region.

After deliberation upon the entire record and all evidence submitted, the Subcommittee recommends to the full Council that this application be denied.

Respectfully submitted,

/s/ Joseph Turco
Joseph Turco

/s/ Barbara Colt
Barbara Colt

/s/ Donald Brown
Donald Brown

EXHIBIT: 10-FULL

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL
BIOLOGIST'S FIELD REPORT

Date of Preparation July 15, 1985
File No. 85-1-33
Date of Application March 21, 1985

Street Shore Gardens off Atlantic Avenue
City/Town WESTERLY

Owners Name Palazzolo, Anthony
Plat No. 155
Lot No. (not indicated)

Address 275 High Street, Westerly RI 02891
Telephone No.

Contractor/Engineer Wes Grant III, PE (Environmental Consultants, Inc., W. Kingston RI)

Names of Adjacent Waterways WINNAPAUG POND

Nearest Utility Pole #184

Project Type: fill coastal and contiguous wetland adjacent to Winnapaug Pond with clean bank run gravel to establish a private beach club for seasonal use; there will be parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, concrete barbeque pits and trash receptacles upon the filled area.

Preapplication __ CRMC Permit Application xx

Review for other agency __ (specify US Army Corps of Engineers: Sect. 404)

Complaint __ (specify _____

Project completion follow up __

Name(s) of investigator(s)	Inspection	
Irene Kenenski	Date 4/18/85	Time 3:30 pm
_____	Date 4/30/85	Time 11:00 am
_____	Date 5/15/85	Time approx. 12:30 pm

1. Ecosystem Types

Shoreline Type: cliff __ scarp __ ledge __ boulder beach __ sand beach __ mudflat xx salt marsh xx brackish marsh __ freshwater __ cobble beach __ other back dune formations (Atlantic Barrier)

Water type: Narragansett Bay (specify where) Other estuary (specify) __ Sounds __ Salt pond WINNAPAUG Freshwater pond __ Stream or river (specify) __

Inland Features: Dune xx Woodland __ Open land xx

Comments: The site is along south shores of Winnapaug Pond, to the north side of Atlantic Avenue; approx. 5000 ft. west of the Weekapaug Breachway and

approx. 1000 ft. north of Atlantic Beach (Block Island Sound); USGS Watch Hill quadrangle.

2. Salt Marsh Vegetation Present:

Spartina alterniflora xx Spartina patens xx Spartina pectinata __ Juncus gerardi xx Limonium carolinianum __ Distichlis spicata xx Salicornia spp. xx Phragmites australis __ Typa angustifolia __ Typha latifolia __ Eleocharis rostellata __ Scirpus americanus __ Iva fructescens __ Agrostis palustris __ Hierochloe odorata __ Elymus virginicus __ Scirpus spp. __ Other _____

3. Significant Environmental Features (biological, hydrological, geological)

The site of approx. 12± acres of fill is entirely *in* salt marsh bordering south shores of Winnapaug Pond. An estimation of total continuous salt marsh area at south shores of the pond is 220± acres, with an additional 100± acres at southwest shores. That this wetland complex is large, continuous and has remained relatively non-fragmented despite development pressures in the area is important in its value assessment.

In the review of this application, the coastal feature is this salt marsh and the inland edge of the coastal feature is the landward (south) wetland boundary.

Winnapaug Pond is 446 acres in size with a mean depth of less than 5 feet and high salinity (26-34 ppt); it is breached at the east end and shoaling is steady at the east end due to sand from the breachway; the immediate surroundings of Winnapaug Pond are prone to coastal flooding (Collins 1985).

Salt marsh is represented by *S. alterniflora* in subtidal areas and high marsh (intertidal) is predominantly *S. patens and D. spicata*. The marsh is interspersed with tidal pools, pannes and mosquito ditches. A gravel road runs along the east side of the site, terminating at a small upland island vegetated with mostly bayberry (*Myrica pennsylvania*) shrubs and with a border of cobble beach at the shoreline. There is a small turn-around at the end of this road; however, no form of launching ramp was observed here, as is indicated on the site plan submitted for application.

Barrier formations are present south of the site; the Atlantic Beach is within 1000 ft. to the south.

Soils of the site are surveyed Matunuck mucky peat, found in tidal marshes and subject to tidal inundation; the daily flooding and high salt content make this soil unsuitable for most uses except as habitat for saltwater-tolerant wildlife (USDA/SCS Soil Survey of RI, 1981). There is concern as to the ability of wetland soil to sustain proposed fill of this magnitude – potential subsidence of the fill may necessitate additional filling in the future. There is question whether the fill can be contained over time, with the possibility for sedimentation to pond waters by overwash or due to scouring at the toe.

Features of the salt marsh contributing to value assessment for habitat and productivity are:

- Open water interspersion, in providing refuge and/or feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds; mosquito ditching enhances edge through the high marsh areas, enables access of fauna to cover areas and permits exchange of nutrient/waste products.

- Size enhances habitat value in providing space requirements and amounts of food and cover available; total area of production.
- Length of shoreline relative to total wetland area increases edge and the interface available for nutrient exchange.
- A tidal water regime is efficient in nutrient import/export (Odum. 1961)
- Net primary productivity of salt marsh emergent vegetation is known to be the highest of natural systems (Nixon, 1982; US Dept. of Transportation, 1982).
- Physiographic location of the wetland suggests heavy wildlife use due to proximity to major open water bodies (coastal pond, ocean) and the diverse surrounding habitat types.

Values of the marsh in addition to habitat and productivity are:

Natural shoreline protection: the abatement of storm surge from both the ocean side and the pond.

Sediment trapping and marsh accretion.

Flood storage.

Nutrient retention in an area subject to bacterial contamination and other runoff associated with development.

Aesthetics: landscape diversity of the coastal zone.

There are endangered/threatened species (plant and avian) inventoried for this marsh within the immediate vicinity of the proposal (ref. RIDEM Natural Heritage Program). The pond is a RIDEM Shellfish Management

Area (see item #4 of this report) and is a designated Area for Preservation & Restoration (APR) under the Coastal Zone Management Act of 1972.

4. Existing land and water uses (note degree of development):

Land uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings – impacts are at present associated with development of buffering back dune areas to the north side of Atlantic Avenue. Winnapaug Pond is presently under study for inclusion with the CRMC SAM Plan – the salt marsh at the south shore of the pond is proposed to be designated an Area of Critical Concern. Water use is Type 2, low-intensity. The pond is a RIDEM Shellfish Mgt. Area, supporting populations of eastern oyster (*Crassostrea virginica*), bay scallop (*Argopecten irradians*) and soft clam (*Mya arenaria*) ref. RI Shellfish Atlas, 1974. The pond also supports a recreational harvest of quahogs (*Mercenaria mercenaria*) and blue crabs, mussels, razor clams and horseshoe crabs are also found; the recreational finfish resources include tautog, bluefish, winter flounder, striped bass and [there is*] a commercial eel trap fishery (Collins, 1985).

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* Bracketed material handwritten.

5. Applicability to CRMP (June 18, 1983):

Area of jurisdiction per Sect. 200.2, 210.3 of the CRMP; activity under jurisdiction per Sect. 130, 300.2, 300.3, 300.6 [and 330.*]

REFERENCES:

Collins, C.A. 1985. Extension of the Salt Ponds Special Area Management Plan to Winnapaug (Brightman's) and Maschaug Ponds and theri [sic] Watersheds. Ch. 3: Water Quality; draft rept. Prepared for Coastal Resources Management Council and Coastal Resources Center. 35 pp.

Nixon, S.W. 1982. The Ecology of New England High Salt Marshes: A Community Profile. US Fish & Wildl. Serv., Washington, D.C. FWS/OBS-81/55. 70 pp.

Odum, E.P. 1961. The Role of Tidal Marshes in Estuarine Production. *In*: NY State Conservationist, June-July. 4 pp.

US Dept. of Transportation. 1983. A Method for Wetland Functional Assessment. Vol. II. Offices of Research & Development, Washington, D.C. FHWA-IP-82-24. 134 pp.

6. Comments on adjacent activities under CRMC jurisdiction:

See violation reports from IJKenenski to CRMC dated 3/19 and 3/22/85 documenting illegal fill encroachment at the landward boundary of this salt marsh, immediately sw. of this site.

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* Bracketed material handwritten.

[SEE FILES (83-3-55, IN THE NAME PALAZZOLO) FOR PREVIOUS PROPOSAL TO FILL THIS SAME SALT MARSH; THAT APPLICATION WAS DENIED.*]

7. Comments on work in progress:

No work in progress.

8. Samples taken, tests performed (note specific location, tide, weather, etc.)

Vegetative samples taken for positive identification; estimate of acres of fill proposed was made from the site plan submitted; the size of the entire wetland complex and other site dimensions were estimated from 1980 B&W aerial prints.

9. Photographs taken (describe):

No photos.

10. Person (s) present other than investigator(s):

4/30/85: Linda Steere, staff biologist
Arthur Ganz, Sr. Marine Biologist (RIDEM Div. Fish & Wildlife)

5/15/85: Ken Anderson, staff engineer

11. Summary of information and views exchanged:

A. Ganz accompanied staff to the site on 4/30/85 in relation to the memorandum of objection to this proposal, submitted to J. Cronan, Chief (Div. Fish & Wildlife) from A. Ganz, dated 4/27/85.

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* Bracketed material handwritten.

12. Recommendations:

This proposal to fill salt marsh at the south shores of Winnapaug Pond for the purpose of establishing a private beach club is in conflict with the following criteria of the *CRMP*:

Sect. 130(A)(1): The proposal must meet the criteria for a Special Exception, whereby the activity serves "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests."

Sect. 150: The applicant has proposed a 50-foot "buffer" from the water's edge to the edge of fill. To establish a "buffer" in this case is technically irrelevant in that the salt marsh (coastal feature) itself is proposed to be filled.

Sect. 210.3(C)(1): "The Council's goal is to preserve, and where possible, restore coastal wetlands."

Sect. 210.3(C)(4): "Alterations to salt marshes . . . abutting Type 2 waters are prohibited except for minor disturbances associated with . . . residential docks and walkways . . . and . . . approved construction or repair of structural shoreline protection facilities."

Sect. 300.2(B)(1): " . . . unless the primary purpose of the alternative is to preserve or engance [sic] the feature as a conservation area or buffer against storms filling . . . is prohibited on . . . coastal wetlands . . . adjacent to Type 1 and 2 waters."

Sect. 300.2(B)(2): "Filling . . . on coastal wetlands is prohibited adjacent to Type 1 and 2 waters . . . unless a consequence of an approved mosquito control project."

Sect. 330(A)(1): "The primary goal of all Council efforts to preserve, protect and, where possible, restore the scenic value of the coastal region is to retain visual diversity and often unique visual character of the Rhode Island coast . . . "

From the standpoint of impacts on biological resources, this proposal represents *direct* loss of salt marsh and its inherent values:

- Loss of wildlife/fisheries habitat.
- Loss of productivity.
- Loss of diversity, in that the marsh functions in overall estuarine system stability, considered as a single production unit (Odum, 1961).
- Loss of nutrient retention – the mitigation of contaminant/runoff impacts to tidal waters of the pond.
- Loss of natural shoreline protection.
- Loss of flood storage, particularly in an area prone to coastal flooding (Collins, 1985).
- Loss of aesthetic value.

In addition to direct losses, the proposed filling of salt marsh presents potential *indirect* impacts: noise and other disturbance factors to wildlife and fish resources associated with adjacent pond/marsh habitat; effects on functional wetland areas adjacent to the site in natural shoreline protection, in flood storage and in circulation;

potential subsidence of fill over time, with resultant sedimentation to pond waters.

As detailed in item #3 and 4 of this report, the site is a RIDEM Shellfish Management Area, a designated Area for Preservation & Restoration under the CZM Act of 1972, and habitat for endangered/threatened species within the immediate vicinity (RIDEM Natural Heritage Program).

It is emphasized that the wetland values are tangible public benefits proposed to be lost with a project intended for private use. According to *CRMP* Sect. 130, the applicant must demonstrate that the project serves "a compelling public purpose . . . and that there is no reasonable alternative means of, or location for, serving the compelling public purpose cited." The environmental losses incurred by alteration must be weighed against any such "compelling public purpose," should it be so demonstrated.

Sigature(s) [sic] Irene Kenenski Date 7/16/85

DEPARTMENT OF THE ARMY
NEW ENGLAND DIVISION, CORP'S OF ENGINEERS
424 TRAPELO ROAD
Waltham, Massachusetts 02254

[SEAL] REPLY TO
ATTENTION OF

July 17, 1985

Regulatory Branch
NEDOD-R-26

Mr. Anthony Pallazzolo [sic]
275 High Street
Westerly, Rhode Island 02891

Dear Mr. Pallazzolo [sic]:

We understand you intend to fill a tidal wetland adjacent to Winnpaug Pond at Shore Gardens off Atlantic Avenue in Westerly, Rhode Island. The purpose is to establish a beach club.

Let me briefly explain Corps jurisdiction. A Corps of Engineers permit is required for all work beyond mean high water in navigable waters of the United States under Section 10 of the River and Harbor Act of 1899. In New England, for purposes of Section 10, navigable waters of the United States are those subject to the ebb and flow of the tide and rivers, lakes and other waters that are used to transport interstate or foreign commerce. Permits are also required under Section 404 of the Clean Water Act for those activities involving the discharge of dredged or fill material in all waters of the United States, including not only navigable waters of the United States, but also

inland rivers, lakes, and streams, and their adjacent wetlands. On the coastline our jurisdiction under the Clean Water Act extends landward to the extreme high tide line or to the landward limit of any wetlands.

Therefore, please apply to this office for a permit to perform this work. The application must be submitted on EWG form 4345. The form and samples of the necessary drawings are enclosed.

If you have any questions on this matter, please contact me at 617-647-8495 or use our toll free-number 1-800-343-4789.

Sincerely,

Marita Yoder
Project Manager
Regulatory Branch
Operations Divisions

Enclosure

Copies Furnished:
See attached sheet
RI CRMC
60 Davis Street
Providence, Rhode Island 02908

Office of Selectmen
Town Hall
High Street
Westerly, Rhode Island 02891

EXHIBIT: 9 – full

DIVISION OF COASTAL RESOURCES – ENGINEER'S FIELD REPORT
TYPE OF REVIEW: A.B.[P.] [Circle One]: ___ FILE NUMBER: 85-1-33

Name: ANTHONY PALAZZOLO

Plat: 155

City/Town: WESTERLY

Lot[s]: _____

Mailing Address: 275 HIGH STREET, WESTERLY RI, 02891

Designer, Address: ENVIRONMENTAL CONSULTANTS; INC., W. KINGSTON, RI

Location: Pole: SHORE GARDENS OFF ATLANTIC AVENUE

Waterway: WINNAPAUG POND

Barrier Beach: ATLANTIC BEACH

Type: DEVELOPED

Proposal: TO FILL COASTAL AND CONTIGUOUS WETLAND ADJACENT TO WINNAPAUG POND WITH CLEAN BANK RUN GRAVEL TO ESTABLISH A PRIVATE BEACH CLUB FOR SEASONAL USE. THERE WILL BE PARKING FOR 50 CARS WITH BOAT TRAILERS, A DUMPSTER, PORT-A-JOHNS, PICNIC TABLES, BARBEQUE PITS OF CONCRETE AND OTHER TRASH RECEPTICLES [sic] UPON THE FILLED AREA (THIS APPLICATION REQUIRES A SPECIAL EXCEPTION UNDER RICRMP SECTION 130.

Inspector: K.W. ANDERSON

Inspector: _____

Date: 5/15/85

Date: _____

Time: 12:30 PM

Time: _____

Persons Present & Views Exchanged: I. KENENSKI (FISH AND WILDLIFE DIVISION BIOLOGIST). DISCUSSED PROGRAMMATIC CONCERNS.

Measurements, Samples, Tests Made: ROUGH AREA MEASUREMENTS TAKEN.

Photographs: NONE TAKEN.

Other Review Items Used [Maps, Charts, Etc.]: STAFF AERIALS, ETC.

Previous CRMC Actions for this Site: FILE NO. 83-3-55 (TO CONSTRUCT BULKHEAD AND MAINTAIN FILL.) WAS DENIED 5/4/83

Corroboration and Adequacy of Plans: ADEQUATE FOR STAFF REVIEW (SUPPLEMENTAL DETAIL OBTAINED INFIELD)

Permit Requirements:

DEM/ISOS: N/A

DEM/Land Resources, Freshwater: N/A

Local Building: N/A

Corps of Engineers: REQUIRED, NOT RECEIVED (PREVIOUSLY DENIED 1/27/[ILLEGIBLE]

Other Local, State, Federal: –

Significant Programmatic Characteristics [Erosion Zone, Etc.]: CRC DESIGNATED APR (AREA FOR PRESERVATION AND RESTORATION)

Public Infrastructure:

Adjacent Roads: ATLANTIC AVENUE

Public Water Service: YES

Public Sewer Service: N/A

Flood Zone Information:

Flood Zone	Base Flood Elevation [B.F.E.]	Wave Height Included?
Closest To Shore:		
V*	15' MSL	YES
—	_____	___
Furthest Inland:		
—	_____	___

B.F.E. is the 100 year intensity Storm Water Level.

Flood Zone at Building/Project Site: V BFE 15' MSL Wave Hgt. Included? YES

Classification of Project:

New Construction _____; Substantial Improvement _____; Accessory; _____

Non-Substantial Improvement: _____ Other: FILLING WETLANDS.

*PRELIMINARY – 12/3/84

Waterway Information:

1983 RICRMP Use Category:

Type 1. Conservation: _____

Type 2. Low Intensity: XX

Type 3. High Intensity Boating: _____

Type 4. Multipurpose: _____

Type 5. Commercial Recreational Harbors: _____

Type 6. Industrial Waterfront & Commercial Navigation Channels: _____

DEM Water Quality Classification: SA

Harbor, Channel Line Information: NOT PERTINENT

Riparian Line Information: NOT PROVIDED

Normal Wave Energy [Not Including Hurricane Events]:

Minimal [Large Wetlands, Small Ponds XX. Low [Fetch < 2 mi =] _____.

Moderate [Fetch 2 to 8 miles =] _____. High [Fetch > 8 mi =] _____.

Direction from which maximum normal fetch emanates: MINIMAL WITHIN POND.

General Waterway Classification & Other Pertinent Information: LARGE (446 ACRES ±) MICROTIDAL COASTAL LAGOON COMPLEX (AVERAGE DEPTH 4-5' ±) WITH EXTENSIVE SALT MARSH FRINGE OF VARIABLE WIDTH. POND IS FLUSHED BY NARROW (120' ± MINIMUM) AND SHALLOW STABILIZED TIDAL INLET. NORMAL TIDE RANGE: 2.6' PLUS 1.2' MOONTIDE SURGE.

Benthic Sediment Information: CONSIDERED COARSE GRAINED. SURFACE APPEARS TO BE SAND (BEACH

ORIGINATED) SUBSTRATE INCLUDING "RECENT" DEPOSITS ON FLOOD TIDAL DELTA.

Circulation & Flushing Information: LIMITED DUE TO DEPTH. (LATERAL ACCRETION OF THE ACTIVE DELTA LOBES FRONTING THE MARSH CONTINUES TO DECREASE DEPTHS WITHIN POND.

Existing Waterway Development & Uses [On Site & Surrounding]: WINNAPAUG POND SUPPORTS EXTENSIVE RECREATIONAL USE.

APPLICANT'S NAME: PALAZZOLO TOWN: WESTERLY

LOCATION: ADJ. SHORE GARDENS.

FILE NO: 85-1-37

MEMO: RECOMMENDATIONS:

(CIRCLE ONE)

ENGINEERING COMMENTS (CON'T.)

AS WELL AS BEING A NATURAL WILDLIFE HABITAT, THE WETLAND SYSTEM ACTS AS A BUFFER TO FLOODING AND PROVIDES A NATURAL POLLUTION AND RUNOFF CONTROL BUFFER FILLING SUCH AN EXTENSIVE AREA (11 + ACRES) OF THE FLOOD PLAIN MAY RESULT IN TIDE SURGE ELEVATION INCREASES AT OTHER LOCATIONS WITHIN THE POND. CONSIDERING THE 50 VEHICLE CAPACITY OF THE PROPOSED PARKING AREA, THE INTRODUCTION OF PETROLEUM BASED POLLUTANTS TO WITHIN A CLOSE PROXIMITY OF THE POND IS ALSO OF CONCERN OVERALL, THE PROPOSED APPLICATION APPEARS TO REPRESENT A SIGNIFICANT

POTENTIAL FOR INCREASED IMPACTS TO THE POND ECOSYSTEM.

REVIEWER'S/INSPECTOR'S SIGNATURE AND DATE:

_____

Coastal Feature Information:

Coastal Feature [s]: AN EXTENSIVE COASTAL WETLANDS SYSTEM 700-1000' WIDE BORDERING THE SOUTHERN SHORE OF WINNAPAUG POND. EXISTING ELEVATIONS OF THE AREA RANGE FROM 0-5' MHW WITH MARSH ELEVATIONS OF 0-2' MHW. A PREVIOUSLY FILLED GRAVEL ROAD (50' x 860' ±) RUNS THROUGH EASTERN PORTION OF PROPERTY.

Existing Shoreline Protection Facilities [On Site & Adjoining]: NONE IDENTIFIED.

Coastal Erosion Characteristics: THE SHORELINE FRONTING THE MARSH (WITHIN THE POND) APPEARS TO BE ACCRETING DUE TO THE MIGRATION OF SAND INTO THE POND VIA THE WEEKAPAUG INLET. (FLOOD-TIDAL DELTA DEPOSITION)

Lateral Access Characteristics: NO LATERAL ACCESS OBSTRUCTION NOTED.

Upland Information:

Backing Upland Feature [s] ¦Note Elevations]: 400-500' WIDE DEVELOPED BARRIER SPIT SYSTEM. ON SITE UPLAND ELEVATIONS ARE LESS THAN 6' MHW. ±

Existing Upland Development [On Site & Surrounding]: LIGHT DENSITY RESIDENTIAL (NORTH OF ATLANTIC AVENUE). A DENSE "STRING" OF RESIDENTIAL DWELLINGS EXIST ALONG SOUTHERN BACK DUNE AREA, SOUTH OF ATL. AVE.

Upland Drainage, Runoff, and Erosion Characteristics: THE EXTENSIVE SALTMARSH SYSTEM CURRENTLY PROVIDES A NATURAL RUNOFF CONTROL BUFFER. NO UPLAND EROSION CONCERN NOTED.

Soils Information [From Soil Survey of R.I., USDA SCS. Except As Noted]: Map Unit[s]: MATUNUCK MUCKY PEAT.

Hydrologic Groups [s]: A: High Infiltration Rate when thoroughly wet _____

B: Moderate . . . _____: C: Slow . . . _____: D: Very Slow . . . XX

Typical High Water Table Information: TIDAL MARSH SUBJECT TO TIDAL INUNDATION. (DAILY)

Glacial Geology:

Upland Till Plains _____.

CMA, & Block Island Moraine _____.

Narragansett Till Plains _____.

Outwash Deposits XX .

Other Pertinent R.I.S.S. Info/Suitabilities: NEARLY LEVEL, POORLY DRAINED. WATER IS PONDED IN SOME AREAS. RAPID TO VERY RAPID PERMEABILITY (RESTRICTED BY HIGH WATER TABLE AND TIDAL

FLOODING) – UNSUITABLE FOR MOST USES EXCEPT AS HABITAT FOR SALTWATER – TOLERANT WILDLIFE

Soils Info from Other Sources [On Site. DEM/ISDS. AP., Etc]:_____

Other Specific Geologic, Hydrologic and Topographic info: _____

Distance of Proposal to Coastal Feature and Elevations of Proposal: THE MAX. ELEV. OF THE PROPOSED 34 200 CU. YD ± FILL (11.4 AC±) IS INDICATED TO BE + 3.5' MSL, EXTENDING TO WITHIN 50' OF MEAN LOW WATER.

Other Pertinent Information: _____

APPLICANT'S NAME: PALAZZOLO

TOWN: WESTERLY

LOCATION: ADJ. SHORE GARDENS

FILE NO: 85-1-33

MEMO/RECOMMENDATIONS:

(CIRCLE ONE)

ENGINEERING COMMENTS.

THE HIGHLY COMPRESSIBLE NATURE OF MUCKY PEAT (AMONG OTHER POOR ENGINEERING CHARACTERISTICS) MAKES THIS SOIL COMPLEX UNDESIRABLE FOR A PARKING AREA/ROADWAY BASE, AS THERE EXISTS THE POTENTIAL FOR EXCESSIVE SETTLEMENT OVER TIME. (POSSIBLY REQUIRING ADDITIONAL FILLING). THE R.I. SOIL SURVEY NOTES A "POOR" RATING OF MATUMUCK PEAT AS

ROADFILL (NOTING WETNESS), ALSO, STORM SURGE FLOODING AND RECESSION WOULD CAUSE MAJOR SEDIMENTATION WITHIN THE POND.

PRESENTLY SEDIMENT, TRANSPORTED THROUGH THE STABILIZED INLET, IS ACCUMULATING ALONG THE SOUTHERN SHORE OF THE POND AS INDICATED BY THE INCREASING SIZE OF THE FLOOD TIDAL DELTAS AND DECREASING DEPTHS. (BOAT NAVIGATION MAY BE HINDERED BY THIS CONDITION.) THE PROPOSED FILL EXTENDS TO WITHIN 50' OF MLW. THE TOE OF THE PROPOSED, 1:6 SLOPED EMBANKMENT IS ACTUALLY AT MHW. EVEN WITH THE PROPOSED CONSERVATION MIX VEGETATIVE COVER STABILIZING THE SLOPE, THE CLOSE PROXIMITY OF THE TOE TO THE POND MAY CAUSE SEDIMENTATION, EROSION, AND TOE SCOURING FROM STORM WAVES AND TIDAL SURGES.

REVIEWER'S/INSPECTOR'S SIGNATURE AND DATE:

APPLICANT'S NAME: PALAZZOLO

TOWN: WESTERLY

LOCATION: ADJ SHORE GARDENS

FILE NO: 85-1-33

MEMO/[RECOMMENDATIONS*]:

(CIRCLE ONE)

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* Bracketed word circled on original.

REFERENCE STAFF BIOLOGIST REPORT BY I KENENSKI DATED 7/16/85 FOR PREVALENT CONCERNS RELATED TO THE RICRMP.

IT IS STAFF CONCLUSION THAT THIS PROPOSAL WHICH REQUIRES A SPECIAL EXCEPTION TO FILL AND ALTER COASTAL WETLANDS (PER TABLE 1), HAS NOT MET THE PREREQUISITES OF SECTION 130 NAMELY TO DEMONSTRATE THAT "THE PROPOSED ACTIVITY SERVES A COMPELLING PUBLIC PURPOSE WHICH PROVIDES BENEFITS TO THE PUBLIC AS A WHOLE AS OPPOSED TO INDIVIDUAL OR PRIVATE INTERESTS" UNLESS THE CRMC DETERMINE THAT SUCH DEMONSTRATION HAS BEEN SHOWN IT IS STAFF OPINION THAT THE PROPOSAL REPRESENTS A DIRECT CONFLICT WITH ESTABLISHED POLICIES AND GOALS OF THE RI COASTAL RESOURCE MANAGEMENT PLAN.

REVIEWER'S/INSPECTOR'S SIGNATURE AND DATE:
/s/ Kenneth W. Anderson 7/25/85

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

WASHINGTON, Sc.	SUPERIOR COURT
ANTHONY PALAZZOLO)	WC/88-0297
VS.)	
STATE OF RHODE ISLAND)	
AND COASTAL)	
RESOURCES)	
MANAGEMENT COUNCIL)	

HEARD BEFORE MR. JUSTICE
FRANK J. WILLIAMS

ON JUNE 18 & 19, 1997

NON-JURY TRIAL - VOLUME 1 OF 4

Anthony Palazzolo

* * *

[98] Q Along the south shore of Winnapaug Pond, are there any built subdivisions that resemble this particular subdivision?

A No.

Q Okay. Isn't the pattern of development on the south shore of Winnapaug Pond for people to build their houses right along Atlantic Avenue?

A I think they are all zoned for houses. Some of the land you are referring to is not zoned for housing.

Q Isn't the pattern of development, as reflected in existing conditions, for people to build houses along Atlantic Avenue and leave the marsh undeveloped?

A Well, I think that's the question we are contesting.

Q I'm asking you the pattern with respect to -

A I don't know.

Q - other areas.

A I don't know what they think, sir. I have no idea how their thinking is.

Q Okay. I'm not asking you what people are thinking. I'm asking you what they have done.

A No one has, except on a couple of occasions that I know of, one guy built a house down there, and a couple other people put roadways in.

[99]Q So it wouldn't surprise you that aerial photographs will show that all of the - most of the residential houses in Misquamicut are bordering on Atlantic Avenue?

MR. WEBSTER: I'm going to object, your Honor. This is absolutely an improper way to cross-examine somebody, with the hypothetical that we don't have here yet.

MR. RUBIN: I think it's proper, your Honor.

THE COURT: I'll let you answer if you can. The answer is yes, right?

Q Yes. Is that the witness' answer?

A Yes. That's where the houses are on it.

* * *

[100] Q Now, you went to the Coastal Council, my client, twice; correct?

A Right.

Q Okay.

A Yes.

Q And the first time was in order to pursue the use as residential lots; correct?

A Correct.

Q Okay. Which is the use which you claim was taken from you?

A The use permitted under the W1 zoning code in Westerly.

Q Right. And that forms the basis of your lawsuit here today; correct?

A Well, I can't answer that fully, but I suppose part of it.

Q Right. So then you came back to Coastal and you asked for another and a different application; correct?

A Correct.

Q And that application was for a beach club?

A Correct.

Q Okay. But your claim before this Court today is based on residences and not a beach club; isn't that correct?

A Correct.

Q But you were denied the application that related to [101] residences back in 1985; isn't that correct?

A I was denied use of all my land. In whatever shape or form, I was denied.

Q In 1985?

A Correct.

Q Okay. But nonetheless, you claim that the date of the taking was February, 1986?

A I don't claim. The legal people that deal with say whatever they say –

* * *